THE UNWELCOME COHORT: WHEN THE SENTENCING JUDGE INVADES YOUR BEDROOM

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INTRODUCTION

Every convict knows that if you do the crime, you must do the time. But what exactly can the government force you to do to "do the time"? It is clear that people who are incarcerated, on parole, and on probation are subject to restrictions that limit their rights, even those rights protected by the Constitution.[1] These invasions can be obvious safety provisions, such as denying the right to carry a gun in prison, or restrictions to prevent future infractions, such as mandatory rehabilitation programs. Although these provisions are intrusive, they are fairly straightforward and generally accepted; however, some restrictions are not so obviously within the government's power.

For most Americans, the decision whether to have a child is between them, their partners, and the powers that be; however, in a number of recent cases, courts have begun to restrict the right to procreate as it applies to those people who have been convicted of certain offenses relating to their children, namely failing to pay child support. One such case is *State v. Talty*,[2] in which an Ohio man was sentenced to make reasonable efforts not to have another child as part of the conditions of his probation for failing to support several of his children.[3] This sentence raises several issues relating to civil liberties in criminal sentencing and begs the question: Just how far into one's personal life can the courts go?

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1 *See* discussion *infra* Part II.C.

2 814 N.E.2d 1201 (Ohio 2004).

3 *Id.* at 1202.

This Note discusses the various issues of civil rights and criminal law associated with the sentence in the *Talty* case and those issues that might arise from similar sentences. Part I outlines the facts and history unique to the *Talty* case. Part II discusses the privacy issues at play in a sentence dealing with procreation and sexuality. This Part explains the procreative rights involved in cases of sterilization, birth control, and abortion, and fleshes out the issues of privacy involved in cases of nonprocreative sexuality. In addition, this Part illustrates the various limits on privacy inherent in a criminal conviction, along with the ramifications that such limits have on the constitutionality of governmental restrictions on behavior.

Part III of the Note discusses the fundamental right to marriage and how it might affect the strength of privacy and procreative rights. Part IV illustrates the various issues involved with requiring birth control in a setting in which such an order contradicts religious teachings. Additionally, Part IV discusses generally the Free Exercise Clause and elaborates on the hybrid rights exception. Ultimately, this Note concludes that courts are allowed to restrict procreative rights in criminal sentencing except in cases where the right to free exercise of religion is used in combination with the fundamental right to marry.

I. CASE FACTS AND HISTORY

On February 27, 2002, Sean E. Talty, a resident of Medina County, Ohio, was indicted for failing to pay child support for three of his seven biological children.[4] Mr. Talty initially pled not guilty to the charges, but eventually changed his plea to no contest.[5] The trial court accepted the plea and requested that each side prepare a brief regarding whether or not a court is permitted to order a convicted criminal to not impregnate a woman while on probation if such an order is reasonably related to his offense, as it was in that case.[6] Briefs from both sides were considered as was a brief filed by the American Civil Liberties Union of Ohio, which supported the position that such a restriction could not be imposed.[7] In a journal entry dated September 6, 2002, Judge James L. Kimbler of the Medina County Court of Common Pleas sentenced Mr. Talty to five years of community control

4 *Id.* at 1202.

5 *Id.*

6 *Id.*

7 *See* Brief of Amicus Curiae American Civil Liberties Union of Ohio Foundation in Support of Appellant Sean Talty, *Talty*, 814 N.E.2d 1201 (No. 03-1344), 2004 WL 5284056 [hereinafter ACLU Brief].

and nonresidential sanctions,[8] which included basic supervision by the Adult Probation Department, and further ordered that Mr. Talty "make all reasonable efforts to avoid conceiving another child."[9]

Mr. Talty appealed this decision to the Ninth District Court of Appeals, claiming that the part of the sentence requiring him to avoid having children violated his Due Process and Equal Protection rights under the Fourteenth Amendment to the U.S. Constitution and various sections of the Ohio Constitution.[10] The Ninth District upheld the trial court's decision, stating that the sanction was constitutional.[11] The Court used the three prong test from *State v. Jones*,[12] which requires that sanctions: (1) be reasonably related to the offender's rehabilitation, (2) have some relationship to the crime which the offender was convicted of, and (3) serve the ends of the probation by relating to criminal conduct or conduct related to future criminality.[13] Although the court acknowledged that there is a fundamental right to procreate, it refused to review the case under strict scrutiny, stating that conditions of probation are not subject to such a strict analysis.[14]

The Ohio Supreme Court overturned the sentence on September 29, 2004, stating that the antiprocreation order was overbroad.[15] The Court focused on the fact that the order did not allow the antiprocreation sanction to be lifted if Mr. Talty were to become current on his child support payments.[16] Although the Court did not address the issue of the constitutionality of the sentence, it did state that the right to procreate is fundamental under the U.S. Constitution.[17]

Before the case was remanded to the trial court, Mr. Talty married his live-in girlfriend, who also is the mother of two of his chil-

8 *See* OHIO REV. CODE ANN. §§ 2929.01(E), 2929.15 (West 2009) (defining a community control sanction and describing its application). These sections state that this form of sanction does not involve a prison term; however, it requires that the felon obtain permission from the court before leaving the jurisdiction and allows the court to impose other conditions on release that the court deems appropriate. *Id.*

9 *Talty*, 814 N.E.2d at 1202; *see also* ACLU Brief, *supra* note 7, at 2 (identifying Judge Kimbler as the trial judge). Mr. Talty was also required to make regular child support payments, remain employed, and receive his GED within five years. *See* State v. Talty, 2003 Ohio App. 3d 3161, ¶ 4 (Ohio Ct. App. 2003).

10 *Talty*, 2003 Ohio App. 3d 3161, ¶ 5.

11 *Id.* ¶ 27.

12 550 N.E.2d 469 (Ohio 1990).

13 *Id.* at 470.

14 *Talty*, 2003 Ohio App. 3d at ¶¶ 16–18.

15 *Talty*, 814 N.E.2d at 1207.

16 *Id.* at 1205.

17 *Id.* at 1203.

dren.[18] When the conditions of his probation were again before Judge Kimbler, the Court held that the antiprocreation sanction could not be imposed on Mr. Talty. The reason for this was that Mr. Talty was a married man, and such an order would interfere with the fundamental right to marriage.[19]

II. THE RIGHT TO PRIVACY

The right to privacy has been considered a fundamental right ever since the U.S. Supreme Court's decision in *Griswold v. Connecticut*.[20] This basic right was expanded and strengthened in subsequent cases, most notably *Roe v. Wade*[21] and *Lawrence v. Texas*.[22] The right to privacy covers two main areas that apply to the *Talty* case: the right to make procreative decisions and the right to privacy in sexual behavior. Sections A and B discuss procreative rights and sexuality, respectively. Section C discusses how a criminal conviction affects the right to privacy and whether or not that consideration will override the Fourteenth Amendment problems.

A. Privacy in Procreative Rights

Regulating procreative rights is neither a new concept nor limited in its potential intrusion. This section illustrates the various ways in which the government has tried to regulate procreation in the past and what it has the potential to do in the future.

1. Sterilization

The *Talty* decision, along with other recent cases such as *State v. Oakley*,[23] is not the first case to deal with the issue of government restriction on procreation. In the 1920s, the Court was called upon to

18 Ostensibly, the court vacated its previous order for this reason. *See* Re-Sentencing Judgment Entry, State v. Talty, No. 02-CR-0075 (Medina County, Ohio Ct. Com. Pl. Nov. 24, 2004).

19 Interview with James L. Kimbler, Judge, Medina County Court of Common Pleas, in Medina, Ohio (Oct. 20, 2008).

20 381 U.S. 479, 484–85 (1965). The Court lists several possible sources for the right within the U.S. Constitution, namely the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.*

21 410 U.S. 113 (1973). For further discussion of *Roe*, see *infra* Part II.A.2.

22 539 U.S. 558 (2003). For further discussion of *Lawrence*, see *infra* Part II.B.

23 629 N.W.2d 200, 212 (Wis. 2001) (creating, for a man who was delinquent in his child support payments, a term of probation that he avoid having more children unless he could show that he was able to support them).

address the sterilization movement.[24] The sterilization movement began in 1883 with the concept of eugenics, which was developed by an English scientist named Francis Galton, and which promoted sterilizing the "dim-witted" or "feeble-minded" during their reproductive years, so as to prevent the "defective" people from genetically passing their faults to an increasingly large portion of the population.[25] The fear among the supposedly nondefective people was that they would be outnumbered and brought to ruin by the masses of the "unfit."[26] States began imposing laws that required that certain people be sterilized against their will in cases of mental incapacity, physical deformity, or conviction.[27] This movement grew in popularity and even had an advocate on the Supreme Court in Justice Oliver Wendell Holmes, who famously stated in *Buck v. Bell*[28] that "[t]hree generations of imbeciles are enough."[29]

Buck was the first major case to deal with this issue. The case involved a woman who was sterilized under a Virginia statute because she was institutionalized and had hereditary "imbecility."[30] The Court upheld this statute and procedure, stating that the State could legitimately require sterilization because it was necessary to the public welfare and did not violate the Due Process Clause.[31] In his opinion for the court, Justice Holmes summarized the purpose for the law by saying, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing

24 WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 5 (1995); *see also* Skinner v. Oklahoma, 316 U.S. 535, 542–43 (1942) (addressing the forced sterilization of a convicted felon); Buck v. Bell, 274 U.S. 200, 207–08 (1927) (addressing the forced sterilization of a "feeble-minded," institutionalized woman).

25 LEUCHTENBURG, *supra* note 24, at 5.

26 *Id.*

27 Julius Paul, *State Eugenic Sterilization History: A Brief Overview*, *in* EUGENIC STERILIZATION 25, 31 (Jonas Robitscher ed., 1973); *see also* Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1428 (1981) (explaining that the negative eugenics movement involved "efforts to eradicate the socially inadequate germ-plasm from the American stock"); A. Felecia Epps, *Unacceptable Collateral Damage: The Danger of Probation Conditions Restricting the Right to Have Children*, 38 CREIGHTON L. REV. 611, 647–52 (2005) (noting that *Skinner* and *Buck* were decided against a social backdrop of general acceptance of eugenics).

28 274 U.S. 200 (1927).

29 *Id.* at 207; *see also* LEUCHTENBURG, *supra* note 24, at 14 (characterizing Holmes's statement as "infamous" and noting that it engendered heated controversy).

30 *Buck*, 274 U.S. at 205–06. The statute left great deference to the superintendents of the various facilities, giving them the sole discretion over who would be brought before the review board. *Id.*

31 *Id.* at 207–08.

their kind."[32] Justice Holmes's opinion seems to support the notion that the government had a legitimate purpose in controlling the reproduction of the unfit, even likening the sterilization procedures to compulsory vaccinations.[33] This decision has been strongly criticized and is currently not followed, despite never being overruled.[34]

The *Buck* decision appears to lend support to the sentence in *Talty*. The argument that it is better for Mr. Talty not to have any more children than to have children that he cannot support, and who will thus be dependent on society for support, traces Holmes's argument that it is better to stop the conception of potentially unfit people than to allow them to become a burden on society. Although these arguments seem similar, the decision in *Talty* has a far more direct link to criminal prevention, as it was clear that Mr. Talty was not likely to support additional children in the near future. The *Buck* decision is far more concerned with preventing a general population of potential criminals from being born, while the *Talty* decision is concerned primarily with the recidivism of one particular offender, as is required when creating terms of probation under *Jones*.[35]

Although the reasoning of the *Buck* decision would more than likely support the sentence in *Talty* on grounds of societal interest, in *Skinner v. Oklahoma ex rel. Williamson*[36] the Court invalidated a statute which used the same eugenics argument as *Buck* for the sterilization of habitual criminals, thus discrediting that line of reasoning.[37] The statute, known as the Oklahoma Habitual Criminal Sterilization Act,[38] violated the Equal Protection Clause of the Fourteenth Amendment by requiring involuntary sterilization for persons convicted of certain "'felonies involving moral turpitude,'" while neglecting to impose the sentence on persons who committed other crimes, particularly white collar crimes such as embezzlement.[39] The Court emphasized the

32 *Id.* at 207. Sadly, the Nazis used this argument during World War II as support for their "'elimination of the unfit.'" *See* LEUCHTENBURG, *supra* note 24, at 16–17 (quoting Dr. Bell).

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

34 *See* LEUCHTENBURG, *supra* note 24, at 17 (stating that some critics referred to Holmes as a "monster" for his decision in *Buck* (internal quotation marks omitted)); Epps, *supra* note 27, at 650 (noting that although *Buck* is not currently followed, it cleared the way for compulsory sterilization of 60,000 mentally disabled people).

35 *See infra* notes 79–81 and accompanying text.

36 316 U.S. 535 (1942).

37 *Id.* at 536, 541–43.

38 OKLA. STAT. ANN. ch. 26, art. 2, § 5044 (Harlow Supp. 1940), *invalidated by Skinner*, 316 U.S. 535.

39 *See Skinner*, 316 U.S. at 536, 541–43 (quoting OKLA. STAT. ANN. ch. 26, art. 2, § 5044).

arbitrary nature of the distinction between crimes and left the door open for sterilization of those offenders whose crimes were related to procreation, although the opinion did invalidate the removal of procreative ability from habitual criminals without a more stringent justification.[40]

Although courts, and more importantly the public, have refused to support mandatory sterilization, it does not necessarily follow from these decisions that a mandate to use "reasonable efforts to avoid conceiving another child" would be invalid. The sentence in *Talty* is narrowly tailored and is an effort to prevent a particular person, not his offspring, from committing a habitual crime related directly to that conception, as opposed to an amorphous law that claimed to be in the name of prevention, but which had the potential to be used widely to discriminate based on race and poverty.[41] Even though the probation condition in *Talty* appears to survive this line of reasoning, these are not the only cases that define the scope of protection for procreative rights.

2. Birth Control and Abortion

Protection of procreative rights did not really take hold until the right to privacy gained prevalence in the United States. With the decision in *Griswold*, the Supreme Court recognized a fundamental right to privacy in procreative decisions, namely the use of contraceptives by married couples.[42] This idea was later expanded to unmarried people in the decision of *Eisenstadt v. Baird*,[43] which struck down a Massachusetts law that prohibited the distribution of contraceptives to unmarried persons.[44] The Court in *Eisenstadt* held that the statute "violate[d] the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment."[45] The Court reasoned that the right to privacy creates a right to use birth control, and that the government's contention that regulation of this activity protected the

40 *Id.* at 540 (stating that the state may "confin[e] 'its restrictions to those classes of cases where the need is deemed to be clearest'" (quoting Miller v. Wilson, 236 U.S. 373, 384 (1915))).

41 *Id.* at 540–42 ("In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.").

42 Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (stating that the idea of government intervention into marital beds is "repulsive to the notions of privacy surrounding the marriage relationship"). In this case, the Court struck down a law which made it illegal for married couples to use birth control and prosecuted doctors for advising or assisting patients with the practice. *Id.* at 485.

43 405 U.S. 438 (1972).

44 *Id.* at 440–43.

45 *Id.* at 443.

public from potential danger did not hold water if some members of the population were allowed to use it unfettered by regulation.[46] The Court equated procreative freedom with the right to privacy, stating, "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."[47] It is clear from these remarks that the Court considered the right to procreation to be fundamental.

The right to make procreative decisions was extended beyond the basic use of birth control by the 1973 landmark decision *Roe*.[48] By ruling that the right to privacy encompassed the right of a woman to obtain an abortion, with certain governmental restrictions, the Court ensured that procreative decisions would be within a protected "zone[ ] of privacy" that must be respected under the Constitution.[49] It is clear that *Roe*, and subsequent decisions of the Supreme Court, such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[50] uphold the constitutional "limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[51] However, as the decision in *Casey* suggests, the right to privacy in procreative decisions is not absolute.[52]

It follows from these cases that the fundamental right to privacy in birth control decisions applies to all people. If this right were taken to its logical conclusion, it would imply that the right not to use birth control would also be fundamental. Because the government cannot infringe on the fundamental rights of its citizens unless the infringement passes strict scrutiny, any condition mandating birth control would not be constitutional without necessity and a compelling purpose.

3. How Privacy Plays into the *Talty* Sentence

One obvious question that arises from the sentence in *Talty* is: What are "reasonable efforts"? There is no evidence to indicate that

46 *Id.* at 450–52.

47 *Id.* at 453.

48 *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (defining a right to abortion within a trimester framework).

49 *Id.* at 152–54.

50 505 U.S. 833 (1992).

51 *Id.* at 849 (upholding some governmental restrictions on abortion while maintaining its protected status under the right to privacy in procreative decisions).

52 *Id.* at 869, 877 (stating that abortion may be restricted by the states when there exists a sufficient interest in the life of the child and upholding regulations that require parental or judicial consent for minors and have a reporting requirement).

the court would consider sterilization to be a mandatory reasonable effort. It is also not reasonable to require that any children conceived by the convicted criminal be aborted, especially in cases where the perpetrator is a man, as the right to choose belongs to the mother alone.[53] It appears a logical conclusion that the Medina County, Ohio Court of Common Pleas meant for Mr. Talty to use some form of birth control. As we see in *Griswold* and *Eisenstadt*, the right to use birth control falls under the right to privacy and cannot be restricted by the government without a compelling reason;[54] and it follows that the right to choose *not* to use birth control would fall under the same exception. The sentence in question must be able to overcome this fundamental right by showing a sufficient state interest under normal circumstances. Were this sentence a blanket rule, it is clear that it would not pass constitutional muster. But this is not the entire story, and many other factors weigh on the ultimate constitutionality of the sentence.

B. Privacy in Sexuality

Although the procreative aspect of the sentence in *Talty* figures prominently in its constitutionality, the concept of privacy in sexual behavior is also an important issue. This seemingly relevant concept was not raised by any of the courts hearing the case; despite the media attention drawn to the issue due to the Court's decision in *Lawrence*, only days after the Ninth District Court of Appeals heard *Talty*,[55] the Supreme Court of Ohio failed to even touch on the issue.[56]

The *Lawrence* decision impacts the issue in *Talty* in two ways. First, it reinforces the proposition that the right to privacy extends beyond procreative sexual activity.[57] Second, it emphasizes the idea that the government does not have the right to interfere in the con-

53 *Roe*, 410 U.S. at 153 (referring only to "a *woman's* decision whether or not to terminate *her* pregnancy" (emphasis added)).

54 *See supra* notes 42–47 and accompanying text.

55 *See* Lawrence v. Texas, 539 U.S. 558, 558 (2003). For explanation of the *Lawrence* decision, see *infra* notes 63–65 and accompanying text.

56 State v. Talty, 814 N.E.2d 1201 (Ohio 2004) (making no mention of privacy in sexual behavior).

57 *Lawrence*, 539 U.S. at 578 ("'[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.'" (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

sensual sexual behavior of adults except in extreme cases.[58] With this ruling in mind, the question becomes: Is a sanction that requires a "reasonable effort" to avoid pregnancy overly intrusive into one's sexual activity outside the realm of procreation?

In order to analyze fully this area of law, it is necessary to begin with the Court's decision in *Bowers v. Hardwick*.[59] *Bowers* arose out of the prosecution of a Georgia man found to be practicing sodomy in violation of a state statute criminalizing the practice.[60] The Court upheld the law, finding that it did not violate the Constitution because there was no fundamental right for homosexuals to engage in sexual activity.[61] Additionally, the Court held that a "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" provided an adequate rational basis for the law.[62]

The decision in *Bowers* stood for almost two decades before it was overturned in *Lawrence*. In *Lawrence*, the Court struck down a Texas statute making homosexual sodomy a crime, stating that it violated the Fourteenth Amendment's Due Process Clause.[63] The Court found that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[64] The Supreme Court's reading of the Fourteenth Amendment created a broad privacy right for sexual behavior that is in no way tied to efforts to produce offspring. Additionally, the Court made it clear that the protection applies to the states as well as the federal government.[65]

Although the courts in *Talty* did not address the right to privacy in sexual behavior, it is a relevant factor in the constitutionality of the sentence. It is clear that a requirement to use birth control, or to abstain from sex altogether, would directly interfere with the private sexual activities of consenting adults. Even though such interference is not an absolute bar, as was the issue in *Bowers* and *Lawrence*, the Supreme Court's holding in *Lawrence* was sufficiently expansive that it

58 *Id.* at 567 (stating that the right to privacy "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects").

59 478 U.S. 186 (1986).

60 *Id.* at 187–88.

61 *Id.* at 189–90.

62 *Id.* at 196.

63 *Lawrence*, 539 U.S. at 564, 578.

64 *Id.* at 574 (citation omitted); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (stating that those matters involving "choices central to personal dignity and autonomy" are protected by the Fourteenth Amendment).

65 *Lawrence*, 539 U.S. at 564, 578.

could reasonably be applied to less than complete restrictions. Under the standard set forth in *Lawrence*, it appears that the *Talty* sentence would violate the right to privacy. However, there is an important difference between these two situations: Mr. Talty was convicted of a crime independent from his sexual behavior and Mr. Lawrence's criminal charges were based on his sexual behavior as a private citizen.[66] As the next section illustrates, convicted criminals do not enjoy the same privacy rights as other citizens.

C. Rights of Convicted Criminals: How Much of Their Privacy Is Forfeited?

If it is true that requiring a person not to have children violates the Fourteenth Amendment for the reasons listed above, how does his status as a convicted criminal change his privacy rights? And if conviction does change these rights, does it allow for enough restriction to overcome the presumed right to have children?

Common sense would suggest that privacy rights are changed by a conviction. A convicted criminal can be imprisoned as punishment for a crime and almost every aspect of his life can be restricted.[67] Many fundamental rights, such as freedom of association, are completely regulated.[68] When dealing with a convicted criminal who is incarcerated, it is necessary for the safety of the officers and other inmates involved, as well as for the purposes of incarceration, that the prison be able to restrict rights when necessary.[69] Despite the lack of rights in prisons, conviction does not mean that a person's rights are automatically forfeited.[70]

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66 *Id.* at 564.

67 *See* Sara C. Busch, Note, *Conditional Liberty: Restricting Procreation of Convicted Child Abusers and Dead Beat Dads*, 56 CASE W. RES. L. REV. 479, 500 (2005) ("[A] regulation may infringe on a prisoner's right if the right in question is inherently inconsistent with incarceration.").

68 *See* Griffin v. Wisconsin, 483 U.S. 868, 872–73 (1987) (holding that the Fourth Amendment's "probable cause" standard for warrants could be replaced by "reasonable grounds" in the search of a probationer's home); Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1036 (2003) ("It is in the nature of incarceration that an individual's freedom is restricted.").

69 Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

70 *Id.* at 545 ("[C]onvicted persons do not forfeit all constitutional protections by reason of their conviction and confinement in prison."). *But see* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 353 (1987) (holding that even where First Amendment

It is not surprising that these rights would be restricted. "Loss of freedom of choice and privacy are inherent incidents of confinement in [a prison]."[71] There is almost no right to privacy in a prison, despite the fact that the right to privacy is fundamental. For example, packages sent to a prisoner can be searched and some items may be banned regardless of the privacy rights.[72] The Supreme Court held in *Turner v. Safley*[73] that prisons can infringe on an inmate's constitutional rights so long as the restriction is "reasonably related to legitimate penological interests."[74] This type of monitoring would most likely pass the Court's strict scrutiny test, were it applied, because public safety is a compelling governmental interest and monitoring is the most basic and least intrusive way to secure prisons.[75]

The courts of Ohio have explicitly stated that those persons convicted of criminal offenses and on probation do not retain the same degree of freedom with regards to constitutional rights as nonconvicted persons.[76] Probation, like parole, is an alternative to imprisonment that relies on certain conditions being met; there is no constitutional or basic right to probation or parole.[77] Although probation and parole necessarily give the convicted person more freedoms than an institutional setting, the "defendant is still subject to limitations."[78] When determining if such limitations are constitutional, the State of Ohio requires only that the sentence meet the standards set forth in the *Jones* decision.[79] Strict scrutiny will not attach even if the sanction infringes on a fundamental right.[80] *Jones* created a three-pronged test, requiring that all parole sanctions: (1) reasona-

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religious exercise claims were made, the Court would not substitute its judgment for that of prison officials).

71 *Wolfish*, 441 U.S. at 537.

72 *Id.* at 550–55.

73 482 U.S. 78 (1987).

74 *Id.* at 89.

75 *Cf. id.* at 90–91 ("[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.").

76 *See, e.g.*, State v. Benton, 695 N.E.2d 757, 759, 763 (Ohio 1998) (holding that a parolee's consent, as a condition of parole, to random warrantless searches waives his constitutional rights).

77 *Id.* at 759–60 ("[A] convicted criminal has no inherent or constitutional right to be conditionally released before the expiration of a validly imposed sentence.").

78 *Id.* at 759.

79 State v. Conkle, 717 N.E.2d 411, 412 (Ohio Ct. App. 1998) ("As long as a condition . . . meets [the *Jones* test], the imposition of the condition is not grounds for reversal."). For explanation of the *Jones* decision, see *supra* notes 12–13 and accompanying text.

80 *Conkle*, 717 N.E.2d at 412.

bly relate to offender rehabilitation; (2) have some relationship to the crime that the offender is on probation for; and (3) relate to criminal conduct or conduct related to future criminality, and thus serve the ends of the probation.[81] This standard is not terribly difficult to meet and does not ensure that the probationer's fundamental rights are protected from governmental control in cases where the sanction and the crime are sufficiently related.

Conditions of parole do not necessarily create the same immediate safety interest as conditions of imprisonment; however, convicted criminals who do not receive jail time may still be restricted in many areas of their behavior.[82] Drug and alcohol use may be monitored,[83] travel may be regulated,[84] and even freedom from warrantless searches may be curtailed.[85] Despite these widely accepted restrictions, it is still unclear that procreative rights may be limited in the same way as other privacy rights.

The issue of limiting procreation as a condition of probation is not new, particularly in the State of Ohio. In *State v. Livingston*,[86] the Sixth District Court of Appeals struck down a provision requiring an unmarried woman not to have another child for the five years that she was on probation for child abuse.[87] Ms. Livingston was a mentally handicapped woman who had set her child down on a space heater, causing burns.[88] In striking down the provision, the Court emphasized that conditions of probation cannot be overly burdensome on the probationer.[89] The opinion does not suggest that all restrictions on probation are overly restrictive, but that the restriction in this case created an undue burden, as Ms. Livingston was more than likely pregnant when she was sentenced.[90]

Despite the outcome of *Livingston*, procreative rights for the criminally convicted are far from certain. In fact, case law from various parts of the country indicates that procreative rights are not pro-

81 State v. Jones, 550 N.E.2d 469, 470 (1990).

82 *Benton*, 695 N.E.2d at 759.

83 *See* OHIO REV. CODE ANN. § 2929.15 (West 2009).

84 *See id.*

85 *See* Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (holding that a probationer's Fourth Amendment rights were not violated by a warrantless search); *see also Benton*, 695 N.E.2d at 763 (holding that a similar warrantless search of a parolee are constitutional).

86 372 N.E.2d 1335 (Ohio Ct. App. 1976).

87 *Id.* at 1336.

88 *Id.*

89 *Id.* at 1337.

90 *Id.* at 1336.

tected for those individuals who are incarcerated.[91] Several cases across differing jurisdictions have rejected the concept of a right to conjugal visits,[92] while others have struck down inmate requests for artificial insemination.[93] In a recent case from the Ninth Circuit, an en banc court held that "the right to procreate while in prison is fundamentally inconsistent with incarceration."[94] The Court reasoned that the right to privacy was necessarily abridged by incarceration and, therefore, those rights that are attached to privacy are "'necessarily and substantially abridged'" as well.[95]

Although it appears that it is possible to limit procreative rights for those persons who are in prison, it is not clear that these limitations are allowed when the most obvious barriers to procreation are removed. There has been no definitive solution to this situation, and the courts that have addressed the issue remain split. A Florida court found in *Rodriguez v. State*[96] that a condition on probation for child abuse that required a woman not to procreate violated her right to privacy and was not sufficiently related to the crime to overcome the presumption of invalidity.[97] However, the Oregon Court of Appeals took the opposite view in *State v. Kline*,[98] holding that a limit on procreation was a reasonable condition of probation in the case of child mistreatment.[99]

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91 Sutherland, *supra* note 68, at 1039–40 ("[U]ntil recently in the United States, the suggestion that prisoners have any constitutional right to either conjugal visits or access to artificial insemination had been denied consistently." (footnotes omitted)).

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

93 *See, e.g.*, Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990); Percy v. N.J. Dep't of Corr., 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995).

94 Gerber v. Hickman (*Gerber I*), 291 F.3d 617, 623 (9th Cir. 2002) (en banc). This narrow decision prevented Mr. Gerber, who was serving a life sentence, from having a sperm sample sent to artificially inseminate his wife. *Id.* at 619, 624. This case was denied certiorari by the U.S. Supreme Court. *Gerber I*, 291 F.3d 617 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002).

95 *Gerber I*, 291 F.3d at 621 (quoting *Hernandez*, 18 F.3d at 137).

96 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

97 *Id.* at 10 ("The conditions relating to marriage and pregnancy have no relationship to the crime of child abuse . . . ." (footnotes omitted)); *see also* People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984) (striking down a procreation condition of probation by holding that any condition which involves a fundamental right deserves "special scrutiny").

98 963 P.2d 697 (Or. Ct. App. 1998).

99 *Id.* at 699.

The Wisconsin case *State v. Oakley*[100] most closely resembles the situation in *Talty*. In this case, Mr. Oakley was convicted of nonsupport of his nine children and ordered to avoid having more children until he could show that he was able to support them.[101] The Supreme Court of Wisconsin upheld the sentence, stating that "the condition [was] reasonably related to the goal of rehabilitation."[102]

While courts remain unclear about probationers' right to procreate, the sentence in the *Talty* case appears to be considered a reasonable condition of probation in many jurisdictions. In Ohio specifically, *Talty* seems to meet the standard set forth in *Jones*. The sanction of not having additional children is reasonably related to the crime of failing to pay child support and is likely to help prevent future crimes of this type by the offender.[103] Additionally, by helping to prevent more financial burdens, the Court created the opportunity for Mr. Talty to pay off some of his debts and thus rehabilitate himself. As the courts tend to be more lenient on government intrusion into general privacy rights of probationers and parolees, the specific procreation concerns mentioned above are given less weight in order to meet the goals of release, despite the holding in *Pointer* requiring special scrutiny in sentences involving fundamental rights.[104] Given courts' analyses of issues of conviction and fundamental rights, it appears that the sentence in the *Talty* case would pass constitutional muster.

III. Marriage: Does This Fundamental Right Change Everything?

Despite the fact that the *Talty* decision appears acceptable in light of the limited privacy rights of convicted criminals, it still may not be constitutional with respect to married people convicted of crimes. There is a strong indication that marriage is a fundamental right that cannot be infringed, even in the case of convicted criminals.[105] The U.S. Supreme Court clearly reserves a special place

100 629 N.W.2d 200 (Wis. 2001).

101 *Id.* at 201–02.

102 *Id.* at 213.

103 The record indicates that Mr. Talty was failing to pay his child support out of financial difficulties, not malice or neglect. *See* Memorandum in Support of Jurisdiction of Appellant Sean Talty at 3–4, State v. Talty, 814 N.E.2d 1201 (Ohio 2004) (No. 03-1344). The increase in his financial burden from additional children would almost surely lead to recidivism.

104 *See* People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984).

105 *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (striking down a Wisconsin statute that required all noncustodial parents under a court order to support a child to get permission from the court in order to marry); *see also* Turner v. Safley, 482 U.S.

in the legal realm for marriage, even stating that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[106] Because the ideas of marriage and procreation are so connected, the question becomes: Does the right to marry enhance the right to procreate? And if so, does that enhanced privacy right overcome the interests of the state in restricting the conduct of convicted criminals?

"[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[107] This concept of marriage has been supported for over a century, beginning with the 1888 case *Maynard v. Hill*;[108] however, that right has been subject to state regulation for just as long.[109] The fundamental right to marriage was most notably defended from state restriction in *Loving*, in which the court struck down a Virginia law that, like the laws of many other states at the time, prohibited marriage by interracial couples.[110] The Court rejected the law because it could find "no legitimate overriding purpose" for such an obviously discriminatory restriction.[111]

In *Griswold*, the Supreme Court read the right to control procreation into the almost mythical right to marriage, and thus gave those procreative decisions even more robust protection than other privacy

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78, 96 (1987) (stating that there exists "a constitutionally protected marital relationship in the prison context").

106 Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

107 *Zablocki*, 434 U.S. at 384; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942))). The cruel irony of the statement in *Loving* is that the fundamental right to marriage has been bypassed for homosexuals simply by narrowly defining the word "marriage." *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006) (holding that while the "right to marry is unquestionably a fundamental right," the "right to marry someone of the same sex . . . is not 'deeply rooted'"). So while this right is vigorously protected by courts, it is completely denied to an entire class of people, without sufficient public interest to justify denial. *See id.* at 30–34 (Kaye, J., dissenting) (attacking as invalid the various bases upon which the state asserts an interest).

108 125 U.S. 190 (1888).

109 *Id.* at 205 (emphasizing that the state "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution").

110 *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

111 *Id.* at 11.

rights might be afforded.[112] Although procreative rights have been expanded to the unmarried,[113] it is clear that the courts are much more protective of the right to marry than the right to procreate.

When it comes to the rights of the incarcerated, the Supreme Court has definitively extended the right to marriage to people in prison.[114] "It is settled that 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.'"[115] Marriage is one of those rights; however, it is subject to those restrictions that are necessary to incarceration.[116] The Court in *Turner* emphasized that certain aspects of marriage remain even during incarceration, but the Court failed to list procreative rights within those rights.[117] As shown earlier in Part II, the right to procreate while incarcerated is not guaranteed, even in the case of married couples.[118]

When the case against Mr. Talty began, he was single and living with his girlfriend who was the mother of two of his children. By the time the Ohio Supreme Court reversed the sanction and remanded the case to the trial court, Mr. Talty and his partner had gotten married and Judge Kimbler removed the sanction.[119] Although this decision benefited Mr. Talty, there is no indication that the right to marriage would provide more protection from government intrusion than would the right to procreate alone. There have been no cases that directly deal with this situation and it is difficult to tell which elements in combination would provide the most protection for a convicted criminal. It is obvious that more freedom is allotted to probationers and parolees than inmates; however, the same funda-

112 *See* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."). For more discussion on this case, see *supra* note 42 and accompanying text.

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

114 Turner v. Safley, 482 U.S. 78, 95 (1987) (stating that although marriages are restricted, "[m]any important attributes of marriage remain"); Sutherland, *supra* note 68, at 1039 ("[T]he U.S. Supreme Court has concluded that prisoners retain another fundamental right, the right to marry.").

115 *Turner*, 482 U.S. at 95 (alteration in original) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

116 *Id.*

117 *Id.* at 95–96.

118 *See* Gerber v. Hickman (*Gerber I*), 291 F.3d 617, 623 (9th Cir. 2002) (en banc) (upholding prison's refusal to allow an inmate to artificially inseminate his wife, with whom he was not allowed personal visits).

119 *See* ACLU Brief, *supra* note 7, at 3.

mental rights may be controlled in both situations, although to a lesser degree. Whether the combination of conditional release over incarceration, procreative rights, and marriage rights is enough to overcome the legitimate governmental purpose of rehabilitating habitually offending deadbeat dads remains a question for the courts.

IV. RELIGION: CAN THE STATE MANDATE BIRTH CONTROL AGAINST CHURCH TEACHINGS?

As shown in the discussion above, there are many rights at play in the *Talty* case that weigh on the constitutionality of the sentence. Although the freedom of religion is not directly at issue in the case, the concepts of birth control, procreation, marriage, and abortion can scarcely be discussed without some reference to its impact.

Religion has often played a part in cases of procreative rights. "[T]he cutting edge of contemporary quarrels between religious communities and individualism is with the right of privacy."[120] It is clear to many that the pro-life movement that has been so active since *Roe* has a strong anchor in religious teachings.[121] In the past, religious beliefs have helped to shape the law, even in the minds of individual justices. For example, during the sterilization movement, many believe that is was Justice Butler's Catholic religious beliefs that caused him to disfavor eugenics.[122]

Besides playing a role in judicial interpretations of what are acceptable government actions, religion also plays an important role in the interpretation of the term "reasonable" as it is used in the *Talty* sentence. Indeed a defendant's religious beliefs may raise a number of questions about the sentence imposed in *Talty*: What are "reasonable efforts" not to conceive a child? Is it reasonable to require that a person use birth control in order to avoid having more children, even if his religion opposes it? Is it reasonable for someone who is not allowed to use birth control to be required to abstain from sex? Does the definition of "reasonable" vary based on a person's religious affiliation? Should it? Would a person who is not morally opposed to abortion be required to have one to avoid violating the terms of her parole?[123]

120 David Rudenstine, *Tolerance: the Bridge Between Religious Liberty and Privacy*, 12 CARDOZO L. REV. 821, 825 (1991).

121 *See id.* at 826 n.25 (stating that of the seventy-five amicus briefs filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), ten were filed by religious organizations supporting the restriction of abortion rights).

122 LEUCHTENBURG, *supra* note 24, at 14–15.

123 This issue also raises the point that punishing a man for having a child may lead to attacks on the woman whom he impregnates in an effort to avoid having the

A. The Free Exercise Clause

In order to begin to answer these questions, we must first look at what the right to religious freedom means. The first obvious source of the right is in the First Amendment, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[124] This clause ensures that citizens may believe whatever they choose without government intervention.[125] Religion, however, is about more than beliefs; it often involves acts that the faithful are called to do, or in many cases, abstain from doing.[126] Despite the fact that the Free Exercise Clause protects activities associated with religious observance, such protection is not absolute.[127] As Justice Scalia stated in *Employment Division v. Smith*,[128] "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[129]

To fully understand the law surrounding the Free Exercise Clause, one must look at the history that led to the current standards of enforcement. Before the Supreme Court's decision in *Smith*, courts were expected to review all cases involving religious infringement under the strict scrutiny standard.[130] This meant that "[t]he government could not make or enforce any law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important ('compelling') secular objective."[131] Although this standard sounds very protective of relig-

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child in violation of the terms of his parole. This issue was not raised by *Talty*, as the conception itself was the violation; however, it might be a problem in future cases and prosecutions.

124 U.S. CONST. amend. I. The Free Exercise Clause was made binding on the states by incorporation through the Fourteenth Amendment in *Cantwell v. Connecticut*. 310 U.S. 296, 303 (1940).

125 Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

126 *Id.*

127 *Id.* at 878–79.

128 494 U.S. 872 (1990).

129 *Id.* at 878–79.

130 *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-*Smith *?*, 108 COLUM. L. REV. 716, 719 (2008) ("[A] number of pre-*Smith* cases had held that state action burdening an individual's free exercise of religion was subject to strict scrutiny.").

131 Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

ion, Professor Michael McConnell indicates that this was not the case in practice, and that "the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims."[132]

In *O'Lone v. Estate of Shabazz*[133] and *Turner v. Safley*,[134] the Court established that the right to free exercise of religion survives incarceration.[135] However, the right, like many other fundamental rights, is limited in those situations in order to meet the goals of incarceration and ensure safety. In those cases, "the Court established that a prison regulation intruding on a prisoner's constitutionally protected rights would be upheld only if such regulation was '[r]easonably related to legitimate penological interests.'"[136]

This whole system changed in 1990 with the *Smith* decision. With that decision, the Supreme Court scrapped the strict scrutiny standard and held that when states make laws that are neutral with respect to religion, yet happen to infringe on a particular religious practice, the state is not required to create an exception to that law to allow for the religious practice.[137] This meant that when fort the benefit of any state institution—for example, a penal institution—a state created a law or regulation that impinged on a religious freedom, the affected individual was generally not entitled to any concessions from that institution to ensure his free exercise, so long as the regulation was not motivated by religious discrimination on its face.

As a response to this decision, and in harsh criticism of it, Congress passed the Religious Freedom Restoration Act of 1993[138] (RFRA). RFRA was meant to overrule the *Smith* decision and "restore the use of strict scrutiny to evaluate free exercise claims."[139] Despite

132 *Id.* *But cf.* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (holding that enforcement of a formal education requirement after eighth grade would prohibit free exercise).

133 482 U.S. 342, 348 (1987) (recognizing that a prisoner's right to freedom of religion survives incarceration).

134 482 U.S. 78, 96 (1987) (recognizing the importance of respecting the religious aspects of marriage).

135 *O'Lone*, 482 U.S. at 348 ("Inmates clearly retain protections afforded by the First Amendment, . . . including its directive that no law shall prohibit the free exercise of religion.").

136 Melissa R. Johnson, Note, *Positive Vibration: An Examination of Incarcerated Rastafarian Free Exercise Claims*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 403 (2008) (alteration in original) (quoting *O'Lone*, 482 U.S. at 349).

137 Employment Div. v. Smith, 494 U.S. 872, 883–90 (1990). In *Smith*, the Court upheld an Oregon law making the use of peyote illegal despite its use in the sacramental ceremonies of the Native American Church. *Id.*

138 Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

139 Cooper, *supra* note 130, at 719.

the public popularity of RFRA, state prison officials were less than pleased, as they were inundated with lawsuits alleging burdens on religion, most of which would have failed under any of the past standards.[140] These headaches were short-lived, however, because in 1997 the Supreme Court overturned RFRA with respect to the states in *City of Boerne v. Flores*,[141] saying that Congress had exceeded its authority in section five of the Fourteenth Amendment to effect remedial measures on the states.[142] With the decision in *City of Boerne*, the Court reverted back to the *Smith* standard and allowed facially neutral laws to burden religious beliefs.[143]

Despite this setback, Congress was not deterred. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act[144] (RLUIPA), which promoted religious freedom for, among other things, incarcerated criminals.[145] "Congress passed this law based on concerns that religious faith in prison was being hindered and evidence that practicing religion promotes rehabilitation and reduces recidivism."[146] RLUIPA creates both a system for hearing prisoners' claims of denial of free exercise of religion and a heightened standard of scrutiny for assessing those claims.[147]

While a convicted person is on probation or when he is released on parole, most of his constitutional freedoms rebound from their limited state to their usual protection. The right to free exercise of religion is one of these rights: restrictions on activity and appearance that might burden religious practices are lifted, and the probationer or parolee is free to attend services at his local place of worship. However, there may be elements of probation that create religious con-

140 Johnson, *supra* note 136, at 404; *see also* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 306 (1999) (noting the burdensome number of lawsuits filed based on RFRA's "tougher scrutiny" standard).

141 521 U.S. 507 (1997).

142 *Id.* at 534–35 ("RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.").

143 Cooper, *supra* note 130, at 720 ("Thus, at least with respect to areas of law left to the states, free exercise claims are protected by the Federal Constitution only if they fall into one of the *Smith* exceptions.").

144 Pub. L. 106-274, § 1, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc to 2000cc-5 (2006)).

145 *Id.* Congress was very careful to stay within its constitutional powers. The Supreme Court upheld this provision as constitutional in *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).

146 Johnson, *supra* note 136, at 405.

147 *Id.* at 406–08.

flicts. When conflicts arise outside of the prison setting, the holding in *Smith* governs the claim of religious burden.

The sentence in *Talty* has the potential to burden convicted persons whose religious beliefs include a prohibition on the use of birth control.[148] Whether the sentence would infringe on religious freedom depends on several factors. The first factor is whether the sentence would qualify as a neutral law with respect to religion. In this case, it appears that it would, as there is no indication that the sentence was targeted to discriminate against any type of religious faith and was not motivated by efforts to discriminate.

Second, the definition of reasonable must be expressed in order to determine if the sentence would actually impinge on a religious freedom. The court in *Talty* did not define reasonableness, and there is no standard definition for the term in this situation, yet it appears that the court meant for Mr. Talty to use some form of birth control. Were the sentence to require outright that Mr. Talty use birth control, the measure would clearly produce a burden on those persons whose religion prevents them from complying; however, in this case, the court left the term vague and undefined, thus allowing the probationer to choose a method of compliance. Under this arrangement, all forms of compliance would have to imply a religious burden in order for the provision to violate the Free Exercise Clause. This would not appear to be the case under this restriction, as there appears to be no religion that prohibits both birth control and abstinence.[149] Although this sentence would surely be a burden, it does not appear to be a religious one under the government-friendly standard of *Smith*.

B. The Hybrid Rights Exception

Despite the difficulty of prevailing in a claim of denial of free exercise of religion, the right to religious freedom can still lead to

148 Mr. Talty never raised a religious objection to the sentence and there is no indication that his faith prohibited the use of birth control. The idea of defining reasonableness in terms of religion is purely academic at this point, but is an important issue of freedom that might factor into future cases.

149 The case might change regarding married couples, as some religions mandate that spouses are entitled to procreative sex as a condition of marriage. *See, e.g.*, Charles J. Reid, Jr., *Toward an Understanding of Medieval Universal Rights: The Marital Rights of Non-Christians in Early Scholastic and Canonistic Writings*, 3 AVE MARIA L. REV. 95, 96 n.2 (2005) (noting that in canon law the understanding of marriage rights was considered to include a right to sexual relations); J.-R. Trahan, *Successions & Donations*, 64 LA. L. REV. 315, 326 n.23 (2004) (citing laws and scripture that describe the duty to engage in sexual relations with one's spouse).

more protection for Mr. Talty. The decision in *Smith* created a second doctrine to deal with these types of claims, known as the hybrid rights exception.[150] The hybrid rights exception creates a higher level of scrutiny in cases that involve the free exercise right combined with at least one other constitutionally protected right; in such cases, two rights which each warrant only heightened scrutiny will require strict scrutiny (also known as the compelling interest standard) when they are both implicated by the same situation.[151] "Put simply, two losers equal[ ] one winner."[152]

One common situation in which the hybrid rights exception is used to imply a higher scrutiny standard is in cases where parents are fighting for "spiritual custody" of their child.[153] In these cases, custody courts have held that the rights in the Free Exercise Clause and the Due Process Clause add up to "a kind of case where . . . the whole is greater than the sum of its constitutional parts."[154] Under this standard, the courts will only limit the power of the parent to determine the child's religious affiliation "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[155] The exception and strict scrutiny have become the norm in these cases, as all religious parenting cases are by definition hybrid.[156] The landmark case in this area (and the one on which the *Smith* opinion is based) is *Wisconsin v. Yoder*,[157] in which several Amish parents were convicted of failing to send their minor children to school in violation of a Wisconsin statute.[158] The Supreme Court emphasized that keeping Amish children out of high schools was important to both the Amish religious beliefs and the further existence of the Amish culture and religion as a whole; yet the Court over-

150 *See* Jeffrey Shulman, *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 174–77 (2008).

151 William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 214 (1998).

152 *Id.* at 219.

153 Shulman, *supra* note 150, at 177.

154 *Id.*

155 Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972); *see also* Shulman, *supra* note 150, at 177 (reiterating the hybrid situation in *Yoder*).

156 Shulman, *supra* note 150, at 177. It is important to note that this norm existed before the decision in *Smith*. The *Smith* decision simply expanded this concept to other general constitutional provisions. *Id.*; *see also* Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (listing potential hybrid rights cases involving other First Amendment rights, before stating that no other rights were implied by the current situation and that the exception did not fit).

157 406 U.S. 205 (1972).

158 *Id.* at 208–09.

turned their convictions not on the basis of the free exercise right, but on the basis of hybrid rights.[159] The Court held that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by [the] record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[160]

The hybrid rights exception applies to more than just spiritual custody cases. In the *Smith* decision, the Supreme Court listed several examples of other rights that have been combined with the Free Exercise Clause in order to meet this standard, including freedoms of press, association, and speech.[161] Despite the fact that the Court only mentioned a few rights in the *Smith* case, "academics have almost universally accepted the [interpretation that other rights can be joined with the freedom of religion] and attempted to use the hybrid exception as a means to expand free exercise protection as much as possible."[162] Although there has been no settled definition, the majority of courts, led by the Ninth and Tenth Circuits, require only that the companion claims have "a colorable showing of infringement of recognized and specific constitutional rights" in order to trigger the higher scrutiny.[163]

One of the rights that courts might allow in the hybrid rights exception is the right to marriage.[164] "[U]nder *Smith*, because marriage is a fundamentally important right protected by the Due Process Clause, it meets Justice Scalia's 'hybrid situation' test."[165] As the right

159 *Id.* at 216 (stating that this objection represents a "deep religious conviction").

160 *Id.* at 233 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

161 *Smith*, 494 U.S. at 881–82.

162 Esser, *supra* note 151, at 238.

163 Swanson v. Guthrie Ind. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998).

164 Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1219 (1995) ("[E]ven under *Smith*, a challenge to the marriage penalty involves a 'hybrid' situation such that strict scrutiny would be appropriate.").

165 Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 737 (2001) (using the exception to promote the legalization of polygamy for religions which support the practice); *see also* Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 87 (2008) ("Thus, even under *Smith*, many polygamy bans would be appropriately subjected to strict scrutiny."); *cf.* Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 43–57 (2006) (concluding that religious exemptions from same-sex marriage bans are required under a hybrid rights analysis).

to marriage is clearly fundamental[166] and often considered a central part of religion, it follows logically that any law that unnecessarily interferes with the freedom to be married and to follow the religious tenets of the institution of marriage would have to be based on a compelling reason.[167]

In the case of the *Talty* sentence, the Court's restriction on his fundamental right to control the activities of his marriage might fall under the hybrid rights exception. As court-imposed birth control could be seen as an intrusion into a religious institution and a fundamental right, the sentence would require a compelling reason to prevent reversal by a reviewing court. Although the reason given for the sentence in this case is legitimate, it is not likely to be considered compelling and the sentence would likely be overturned. It is important to note that in order to assert this defense, a person in Mr. Talty's position would have to show a sincere belief in a religion banning birth control and that such a tenet of the religion is central;[168] this qualification cuts down dramatically on the number of people who might use this defense.

Conclusion

Despite what many people initially expect (and what I expected), it does not appear from the case law that convicted criminals are protected from government restriction on their procreative rights alone. The government has tremendous power to control even the most intimate aspects of a probationer's life, provided that such a restriction is reasonably related to the crime committed, the probationer's rehabilitation, and prevention of a future occurrence of that crime.[169] While this allows for great intrusion, it is hardly carte blanche. The limitations cannot be permanent and must have a reasonable justification specific to the offender and the offense behind them, which is far more than can be said for the eugenics movement.[170]

The only right that can trump the imposition of this type of sentence outright is the right to free exercise of religion in combination with the fundamental right to marry. This unexpected conclusion comes primarily from the flexibility built into the *Talty* sentence's "reasonable efforts" requirement. Reasonableness is in the eye of the

166 *See* discussion *supra* Part III.

167 Although it appears to fit the criteria necessary to trigger strict scrutiny, the court has not addressed this issue directly.

168 *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

169 *See supra* notes 67–85 and accompanying text.

170 *See* discussion *supra* Part II.A.1.

beholder, thus allowing the sentence to circumvent religious problems. The imposition of a more specific sentence—such as no sex at all or mandatory birth control—would not be able to pass constitutional muster.

And what has become of Mr. Talty? Despite the fact that the procreation restriction was lifted from his sentence, he was unable to stay out of legal trouble. After the remand and resentencing, Mr. Talty failed to report to his probation officer as mandated in the terms of his release.[171] As a result of this violation, he was sentenced to 180 days in jail.[172] His procreative rights were surely infringed by his incarceration in the Medina County jail cell.

At the end of this analysis, we must ask whether enforcement of these laws is worth giving the courts this much power over our private lives. This question is a difficult one to answer; the criminally convicted would almost surely say no, while those who deserve and depend on the support that the law mandates would almost surely say yes. Ultimately, while this power is not inherently unjust, it must be very closely monitored for abuse.

171 Probation Violation Judgment Entry at 2, State v. Talty, No. 02-CR-0075 (Medina County, Ohio Ct. Com. Pl. May 19, 2006).

172 *Id.*