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## The Human Right to a Fair Start in Life

Matthew Hamity, Esq.\*

### ABSTRACT

*This article tackles a reemerging debate between trial courts and just about everyone else: can a judge condition an offender's early release or probation on successfully avoiding future pregnancy? Wading into such controversial territory has its risks, as Tennessee Judge Sam Benningfield discovered in 2017 when he conditioned inmates' early release on their having vasectomies or long-term birth control implants. The order generated outrage across the political spectrum, earning Benningfield a formal reprimand from the Tennessee Board of Judicial Conduct and even sparking a bill that would specifically prohibit any similar future quid pro quo.*

*While the backlash to Judge Benningfield's order in particular is well deserved, his critics also reject wholesale the notion that courts could ever be justified in conditioning probation or early release on avoiding conception. This article stakes out new territory in the debate, arguing that such orders may protect a child's right to a fair start in life without violating parents' constitutional rights nor their human right to found a family if (1) the offender may choose the particular birth control method and (2) the orders only apply to severe child abuse or neglect offenders during a limited rehabilitative period.*

*Grounded in the foundational principle that parents known to abuse and neglect children should not have more absent rehabilitation, and cognizant of structural inequities of race, class, gender, and national origin, the article presents a model "Fair Start" order that may be implemented in courts across the country.*

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## **The Human Right to a Fair Start In Life**

### **I. INTRODUCTION**

In May of 2017, Judge Sam Benningfield offered inmates in White County, Tennessee, an unusual quid pro quo: 30 days' credit toward jail time for agreeing to a vasectomy or a contraceptive implant. The judge's proposition sparked public outcry as well as several civil rights lawsuits on behalf of jailed inmates, and by November the Tennessee Board of Judicial Conduct had formally reprimanded Benningfield and eliminated the program. The Tennessee state legislature soon followed with a bill to prohibit any similar trading of birth control for early release.

That Judge Benningfield's order was fatally flawed is clear, being overbroad in its application, as well as unnecessarily prescriptive by requiring that inmates submit themselves to a particular medical procedure. However, critics dismiss not just Benningfield's own ill-conceived attempt at "preventing the birth of substance addicted babies," but also reject wholesale the notion that courts could *ever* be justified in issuing orders that condition probation or early release on avoiding conception. This article contends that such outright dismissal is unfounded, occurring within a pronatalist family planning framework that fails to acknowledge (1) the irrevocable, lifelong harm inflicted upon children born to abusive or negligent parents, (2) that the public child welfare system is frequently no better, (3) that the parents themselves benefit from avoiding pregnancy, having more time and resources to dedicate toward rehabilitation.

This article further argues that "Fair Start Orders"—if modified to simply proscribe conception (so that the offender chooses the particular birth control method) and narrowly tailored to apply only to serious child abuse or neglect offenders during a limited rehabilitative period—may best protect a child's right to a fair start in life without violating parents' constitutional rights nor their human right to found a family.

### **II. THE GLARING NEED FOR FAIR START ORDERS TO PREVENT ABUSE AND NEGLECT OF FUTURE CHILDREN**

In 2016, child protective services agencies (CPS) received an estimated 4.1 million referrals for abuse and neglect involving

approximately 7.4 million children in the United States.<sup>1</sup> National statistics, despite underreporting,<sup>2</sup> estimate that 1,670 to 1740 children die from parental or caregiver abuse and neglect in the U.S. annually.<sup>3</sup> In 77.6% of child abuse and neglect cases, the parents are themselves the perpetrators.<sup>4</sup>

In cases where the child survives severe abuse or neglect, CPS may remove the victim (and, under certain circumstances, their siblings<sup>5</sup>) from the abuser's custody. However, abusive parents have carte blanche to conceive additional children, and those additional children are also likely to suffer severe abuse and neglect, be it in the home or upon removal to the public child welfare system.

A. SEVERE CHILD ABUSE AND NEGLECT RECIDIVISM RATES ARE HIGH, BOTH DURING REHABILITATION AND AFTERWARD

In keeping with the national policy of family preservation, substantial public resources have been dedicated to treatment services for child abuse and neglect offenders so that they may retain or regain custody of their children.<sup>6</sup> Nonetheless, the success of these rehabilitative programs has been mixed at best, with studies finding that more than one-third of offenders maltreated their children during the treatment period; and over one-half of the offenders were judged likely to mistreat their children following

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<sup>1</sup>*Child Maltreatment 2016: Reports from the States to the National Child Abuse and Neglect Data System*, U.S. Dept. of Health and Human Services Children's Bureau.

<sup>2</sup>Schnitzer, P. et al, *Advancing public health surveillance to estimate child maltreatment fatalities: Review and recommendations*, *Child Welfare*, 92(2), 77-98 (2013).

<sup>3</sup>*Children and conflict in a changing world: Machel study 10-year strategic review*. New York: UNICEF (2009).

<sup>4</sup>*Child Maltreatment*, *supra* note 1.

<sup>5</sup>*See, e.g., In re Baby Boy Santos*, 336 N.Y.S.2d 817, 820 (N.Y. Fam. Ct. 1972) (holding that there was sufficient evidence to terminate the parental custody rights for a baby boy given the significant amount of abuse his sister had suffered even though he had not personally suffered abuse); *see also In re Interest of M.B.*, 480 N.W.2d 160, 161-62 (Neb. 1992) ("If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.").

<sup>6</sup>Elizabeth Bartholet, *Creating A Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60

completion of the program.<sup>7</sup> Worse yet, the more severe the previous abuse or neglect, the more likely parents were to re-abuse.<sup>8</sup>

B. CONCEPTION OF ADDITIONAL CHILDREN ITSELF INCREASES RISK OF RECIDIVISM AND INTERFERES WITH REHABILITATION

With recidivism rates already high, social science data indicates that subsequent pregnancies further increase the risk of child abuse or neglect.<sup>9</sup> Courts, too, have acknowledged the likelihood that the conception of additional children exacerbates already abusive or negligent environments.<sup>10</sup> As a matter of common sense, a parent convicted of severe neglect or abuse is better equipped to focus on rehabilitation when he or she does not have an additional infant to care for.

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<sup>7</sup>Anne H. Cohn & Deborah Daro, *Is Treatment Too Late? What Ten Years of Evaluative Research Tells Us*, 11 *Child Abuse & Neglect* 433 (1987); see also *Frequency of Child Maltreatment Recurrences Among Families Known to CPS*, 3 *Child Maltreatment* 27 (1998), available at <http://cmx.sagepub.com/content/3/1/27> (reviewing forty-five maltreatment recurrence studies and concluding that the rates for mid to high risk cases are high, ranging up to over 50%).

<sup>8</sup>Berkely Planning Associates, *Child Abuse And Neglect Treatment Programs: Final Report And Summary Of Findings From The Evaluation Of The Joint Ocd/Srs National Demonstration Program In Child Abuse And Neglect 1974-1977*.

<sup>9</sup>See Lesa Bethea, M.D., *Primary Prevention of Child Abuse*, *American Family Physician*, March 15, 1999, available at <http://www.aafp.org/afp/990315ap/1577.html> risk factors for child abuse include ‘lack of preparation for the extreme stress of having a new infant’ and ‘multiple young children’; Samer S. El-Kamary et. al., *Hawaii’s Healthy Start Home Visiting Program: Determinants and Impact of Rapid Repeat Birth*, *Pediatrics*, Vol. 114, No. 3, Sept. 2004, at e317, available at <http://pediatrics.aappublications.org/cgi/content/abstract/114/3/e317> (finding that families “already at risk for child maltreatment” mothers were likely to have ‘severe maternal parenting stress,’ ‘neglectful behavior’ and ‘poor warmth’ toward the new child when having a child within 24 months of a previous birth); see also Richard L. Light, *Abused and Neglected Children*, 43 *Harvard Educ. Rev.* 556 (1973) (noting that children in larger families have an increased chance of being abused.)

<sup>10</sup>See, e.g., V.R., 2004 WL 3029874, at \*4 (‘[R]efraining from getting pregnant again at this time will help enable this respondent to get her difficult life under control so she can care adequately for her baby ....’); *In re Appeal in Pima County Juvenile Dependency Action No. 96290*, 785 P.2d 121, 124 (Ariz. Ct. App. 1990) (“[t]he [trial] Court believes these are young parents who have been overwhelmed by their rapidly expanding family and steadily diminishing resources. The mother has had a tremendously difficult load to bear as essentially the sole parent for the family because of the father’s alcoholism.”)

C. THE WAIT AND SEE APPROACH CAUSES PERMANENT HARM TO FUTURE CHILDREN

It is not uncommon for CPS to wait until a child has been repeatedly abused before finally removing the child. In North Carolina, for example, an investigation found that more than 120 children died in the state within a year of their parents or caregivers being referred to a state agency; more than 30 of the children were killed by being beaten to death, shot, drowned, smothered, or poisoned by drugs.<sup>11</sup> In Florida, between 2008 and 2014, 447 children died of abuse or neglect *after* their families had come to the attention of Florida's Department of Children and Families.<sup>12</sup>

In those cases where the child survives the abuse, the delayed intervention by CPS nonetheless causes irreparable harm: indeed, even a single instance of child abuse can have long lasting effects, including neurological dysfunction, learning and intelligence deficiencies, poor language skills, and maladjustment to school.<sup>13</sup> Moreover, one study found that 80% of young adults abused as children met the criteria for at least one psychological disorder, and about 30% of abused and neglected children will later abuse their own children.<sup>14</sup>

And yet, the state's reluctance to remove children from their abusers is not without some justification since (1) the removals themselves are traumatic (even for children with abusive or negligent parents),<sup>15</sup> and (2) abuse and neglect is widespread in the state system as well.<sup>16</sup> The recent opioid crisis in the U.S. has only accelerated the problem: foster care cases involving drug-using parents have hit the highest point in more than three decades of

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<sup>11</sup>Greg Barnes, *Observer Investigation: Deaths point to crisis in NC's child welfare system*, Fayetteville Observer (Sept. 23, 2017), available at <http://www.fayobserver.com/news/20170923/observer-investigation-deaths-point-to-crisis-in-ncs-child-welfare-system>.

<sup>12</sup>*Innocents Lost: A Miami Herald I-Team Investigation*, Miami Herald (Mar. 16 2014), <http://media.miamiherald.com/static/media/projects/2014/innocents-lost/>, archived at <http://perma.cc/GU2S-LAK8>

<sup>13</sup>Harold P. Martin & Patricia Beezley, Behavioral Observations Of Abused Children, In *Child Abuse: Commission And Omission*, supra note 1, at 436-38 (discussing characteristics of abused children).

<sup>14</sup>See Child Help, National Child Abuse Statistics (2009). <http://www.childhelp.org/resources/learning-center/statistics#>.

<sup>15</sup>Catherine R. Lawrence et al., The Impact of Foster Care on Development, 18 *Development and Psychopathology* 57, 58 (2006).

<sup>16</sup>Children's Advocacy Inst. & First Star, *Shame on U.S.: Failings by All Three Branches of Our Federal Government Leave Abused and Neglected Children Vulnerable to Further Harm* 29 (2015).

record-keeping, accounting for 92,000 children entering an already overburdened system in 2016.<sup>17</sup>

It is evident then, that once a child is born to abusive parents, CPS's role is largely one of determining which is the lesser of what are undeniable evils: parental abuse, traumatic removal, and a likelihood of abuse in state custody. It behooves us therefore, in instances where the parent has already committed severe child abuse, to intervene *before* an additional child is born. This Article will argue for intervention in the form of a "Fair Start" order, whereby courts may condition probation on avoiding conception during a rehabilitative period in order to best protect a child's right to Fair Start in life.

### III. THE FAIREST OF THEM ALL: TOWARD A MODEL FAIR START ORDER

While Tennessee Judge Benningfield's intentions may or may not have been noble when he offered inmates early release in exchange for their having a vasectomy or contraception implant—having hoped to "prevent[] the birth of substance addicted babies"—the glaring legal inadequacies of his order lent credence to the notion that judicial intervention along these lines is "backward" and "archaic" and "Neanderthal."<sup>18</sup> First, Benningfield's proposal was overly broad, being applied to all inmates rather than narrowly tailored so as to apply only to those with convictions for "severe child abuse and neglect."<sup>19</sup> Second, Benningfield proscribed the

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<sup>17</sup>*Number of children in foster care continues to increase*, U.S. Dept. of Health and Human Services, (Nov. 30, 2017), available at <https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase>; see also Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 *Fordham Urb. L.J.* 935, 939 (2005) (noting that the foster care system in this country amounts to what one court called a "lost generation of children whose tragic plight is being repeated every day." (quoting *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960 (D.C. Cir. 1991)).

<sup>18</sup>Joe Patrice, *Prison Snips Sentences If Inmates Snip... (Yes, We're Talking About Vasectomies)*, *Above the Law* (July 20, 2017), <https://abovethelaw.com/2017/07/prison-snips-sentences-if-inmates-snip-yes-were-talking-about-vasectomies/>.

<sup>19</sup>See Tenn. Code Ann. § 37-1-102(22) ("Severe child abuse" means: (A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death;

particular method of birth control in the form of a vasectomy or long-term contraception implant, when the same result could theoretically be achieved through less invasive measures such as condoms, birth control pills, or abstinence, all of which are less likely to harken back to sterilization's sinister, racist history.<sup>20</sup>

Just months after Benningfield's order, on February 8, 2018, a federal judge in Oklahoma issued a shorter sentence to a defendant as "the benefit of her decision to be sterilized."<sup>21</sup> While the sterilization "decision" may have been her own, it was decidedly not her *idea*: the judge had advised that defendant that at her upcoming sentencing hearing for passing a counterfeit check "she may, if (and only if) she chooses to do so, present medical evidence to the court establishing that she has been rendered incapable of procreation"

Yet this judge did not receive the same public backlash and professional criticism that Judge Bennington did,<sup>22</sup> perhaps in part because his order targeted a defendant who had already relinquished parental rights to six of her seven children after an Oklahoma Department of Human Services investigation found she had "fail[ed] to protect the children from harm" and had used cocaine and methamphetamine during much of that time.<sup>23</sup>

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(ii) "Serious bodily injury" shall have the same meaning given in § 39-15-402(d).

(B) Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or intellectual disability, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct").

<sup>20</sup>See *In re Bobbijeane P.*, 2 Misc. 3d 1011(A), 784 N.Y.S.2d 919 (Fam. Ct. 2004), *adhered to*, 6 Misc. 3d 1012(A), 800 N.Y.S.2d 342 (Fam. Ct. 2005), and *order vacated in part*, 46 A.D.3d 12, 842 N.Y.S.2d 826 (2007) ("It is important to note that the court is *not* directing what steps the mother should take in order to *not* get pregnant, or what steps the father should take in order to *not* get any woman pregnant. Practices are available to avoid or prevent pregnancies consistent with personal and even religious beliefs. There are a great variety of birth control methods available.")

<sup>21</sup>Findings At Sentencing at 5, *United States v. Creel*, CR-16-189-002-F.

<sup>22</sup>The lack of backlash may be attribute in part to Friot's status as a federal, rather than state, judge, since federal judges are not directly beholden to voters, being appointed rather than elected.

<sup>23</sup>*Id.* at 3-4. (Still, there were problems with Judge Friot's order, including his gratuitous reference to the defendant's children being "out of wedlock" and the somewhat cavalier tone he adopted in challenging the government's contention that consider[ing] Creel's voluntary sterilization procedure in determining a sentence" might violated her fundamental constitutional right to procreate, retorting, "the Supreme Court has yet to recognize a constitutional right to bring crack or methamphetamine addicted babies into this world." Judge Friot

Indeed, a plurality of courts have found a compelling state interest sufficient to overcome even strict scrutiny when the defendant has exhibited a pattern of repeatedly neglecting or abusing his or her existing children, assuming the order is applied for a limited rehabilitative period.<sup>24</sup>

In a landmark case, the Supreme Court of Wisconsin approved as constitutional a court order preventing a recidivist defendant from having children until he was able to care for them.<sup>25</sup> Similarly, in *State v. Kline*, an Oregon appellate court held that a drug-using and physically abusive father could be prohibited from conceiving a third child until he had completed drug-treatment, anger management and counseling programs, and had received the court's written approval lifting the no-conception ban.<sup>26</sup>

New York's highest court has gone so far as to note that "parental 'rights' are not so much 'rights', but responsibilities...." a principle that a subsequent court relied upon in concluding that "a parent has the responsibility to rear his or her children, but not an unlimited right to bear children irresponsibly."<sup>27</sup> And in California, legislative authorization of procreative restrictions as conditions of probation were specifically envisioned in the case of *People v. Zaring*.<sup>28</sup>

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also failed to describe in detail the facts involved in defendant's failure to protect six of her children from harm—this kind of order requires a detailed factual records as justification).

<sup>24</sup>Whether or not strict scrutiny would actually be applied remains an open question, since "the sweeping references to the procreative right in modern substantive due process cases are dicta...." Carter Dillard, *Child Welfare and Future Persons*, 43 Ga. L. Rev. 367, 416 (2009); see also I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135, 1141 (2008) ("American constitutional jurisprudence appears to treat the right to be and not to be a gestational parent (still in the non-interference sense) as conjoined. But this bundling is not inherent." (footnote omitted)); *id.* at 1149-50 ("*Griswold* thus emphasized the invasion of the marital 'space,' not the interference with procreative decisions per se as the harm . . .")

<sup>25</sup>*State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002).

<sup>26</sup>963 P.2d 697, 699 (1998).

<sup>27</sup>*In re V.R.*, 6 Misc. 3d 1003(A) (Fam. Ct. 2004) (quoting *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976)).

<sup>28</sup>8 Cal. App. 4th 362, 374, 10 Cal. (1992).

## A. GUIDING PRINCIPLES FOR A MODEL FAIR START ORDER

*i. Orders should be rehabilitative rather than punitive*

“Termination statutes by their very nature, are prospective and predictive . . . . Their purpose is not to punish parents for past behavior, but rather to prevent future harm to children by interpreting past behavior as indicative of future parental unfitness.”<sup>29</sup> Fair Start orders should operate the same way, and this can be achieved by requiring completion of rehabilitative treatment in conjunction with the procreative restriction. Some commentators seem to presume that Fair Start orders and rehabilitative treatment are somehow mutually exclusive.<sup>30</sup> On the contrary, as previously discussed, the procreative restrictions themselves help facilitate rehabilitation by allowing the offender to focus time and energy on treatment rather than care for a new child.

*ii. Orders should be issued in cases of “severe child abuse,”<sup>31</sup> preferably as a replacement for “no custody” orders*

Recognizing that “requir[ing] [a] child to suffer the fate of his [severely abused] siblings prior to termination of parental rights would be a tragic misapplication of the law”<sup>32</sup>; that “to wait until injury to decide issue of health and development of child makes no sense,”<sup>33</sup> ; that “require[ing] a child to suffer abuse in those cases where mistreatment is virtually assured is illogical and directly averse to society’s fundamental policy of preserving the welfare of

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<sup>29</sup>Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 Calif. L. Rev. 757, 786 (1996)

<sup>30</sup>See Steven M. Berezney, *Zablocki Reborn?: The Constitutionality of Probation Conditions Prohibiting Deadbeat and Abusive Fathers from Conceiving Children*, 5 J. L. Society 255, 309–10 (2003) (“Abusive fathers like Kline should also be rehabilitated instead of prohibited from procreating. A procreation ban for several years will not cure anger management problems. In cases like Kline, courts should first condition probation on successful completion of several anger management and other related courses in hopes of rehabilitation. Until abusive fathers get their emotions and anger under control, they will continue to beat their wives and children long after their probation expires.”).

<sup>31</sup>*Supra* note 19, defining “severe child abuse” under Tenn. Code Ann. § 37-1-102(22).

<sup>32</sup>*In re Interest of J.A.J.* (Mo.App.1983), 652 S.W.2d 745, 749.

<sup>33</sup>*New Jersey Div. of Youth & Family Services v. A.W.* (1986), 103 N.J. 591, 616, 512 A. 2d 438, 451, at fn. 14.

its youth,”<sup>34</sup>; courts have upheld termination of parental rights *before* a particular child has suffered any specific injury on the basis that the harm caused to his or her sibling evinces a substantial risk that he or she will suffer a similar fate.<sup>35</sup>

Several states go a step further, allowing for the termination of parental rights *at birth* because the parents’ severe neglect and abuse of previous children was sufficient to demonstrate a “substantial risk of harm” to the infant.<sup>36</sup> In California, for example, if a parent causes the death of a child through abuse or neglect, they are presumed unfit as to all future children, making a child’s removal at birth via “no custody” order highly likely, and all but guaranteed if the offender has an additional child before he or she has time to be rehabilitated.<sup>37</sup>

While the same logic that supports “no custody” orders would seem to support “fair start” orders as well, courts have held that probation orders prohibiting procreation are not “reasonably related to future criminality” because they are in fact redundant with “no custody” orders.<sup>38</sup> Such reasoning is fundamentally flawed since (1) it incorrectly assumes that children are not harmed by having been raised in the public system, in direct conflict with the state policy’s

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<sup>34</sup>*Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So. 2d 565, 569 (Fla. 1991).

<sup>35</sup>See generally, Karen S. Kassebaum, *The Siblings of Abused Children: Must They Suffer Harm Before Removal from the Home?*, 29 Creighton L. Rev. 1547 (1996).

<sup>36</sup>See, e.g., *In re N.H.*, 889 A.2d 727, 727 (Vt. 2005) (discussing family court order permitting removal of newborn from mother whose parental rights with respect to four previous children had been terminated by courts in three different states); *In re K.C.H.*, 316 Mont. 13, 17 (2003) (rejecting argument that actual, not prospective, abuse or neglect is required for a child to be deemed a “Youth in Need of Care,” buttressed by the statutory language providing that a “substantial risk of harm to a child’s health or welfare” constitutes child abuse).

<sup>37</sup>Adrienne McKay, *Termination of Parental Rights in California: Why A Temporary Prohibition on Conception Would Have Better Served Ethan N.*, 35 Sw. U. L. Rev. 61, 72 (2005).

<sup>38</sup>See, e.g., *Howland v. State*, 420 So. 2d 918, 919–20 (Fla. Dist. Ct. App. 1982) (“[A]lthough this condition of probation could reasonably relate to future criminality-i.e., child abuse-it could do so only if appellant had custody of the child or was permitted to have contact with the child. In this case, however, those possibilities have already been foreclosed....by the other valid conditions of probation.”); *Rodriguez v. State*, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (“[W]e hold that the condition prohibiting custody of children has a clear relationship to the crime of child abuse and is therefore valid. The conditions relating to marriage and pregnancy have no relationship to the crime of child abuse, and relate to noncriminal conduct. Possibly these conditions could relate to future criminality, if the marriage or pregnancy resulted in custody of minor children who could be abused. But we hold that the conditions are not reasonably related to future criminality, since such custody of minor children is already prohibited by the valid condition directly addressed to custody”).

in favor of maintaining the family unit; (2) fails to account for the resulting burden on the already struggling public welfare system (as well as the taxpayer)<sup>39</sup>; and (3) fails to prevent pre-birth harms to future children in the case of substance-abusing mothers or abuse fathers who commit violence against pregnant mothers. Furthermore, scholars have argued that the removal of newborn infants from parents is far more intrusive than temporarily prohibiting would-be parents from procreating.<sup>40</sup>

One way to get around courts' flawed reasoning is through legislative authorization of Fair Start orders, since doing so changes the test applied in determining the validity of the probationary conditions. In Florida, for example, in enacting a statutory authorization of Fair Start orders would transform them from "special conditions" of probation to "general condition"; "general conditions" need only to be "rationally related to the State's need to supervise the defendant regardless of whether the condition is reasonably related to the defendant's offense...."<sup>41</sup>

*iii. Legislative authorization of Fair Start orders should explicitly account for the principles of affirmative action, and structural inequities of race, class, and gender.*<sup>42</sup>

On the one hand, there is good reason to be wary of any policy that contemplates limitations on procreative rights, given the racist, sexist, and classist history of state efforts to limit procreation through eugenics programs and other population control efforts.<sup>43</sup> On the other hand, "[t]he past application of morally reprehensible policies designed to restrict reproduction does not entail the wrongness of any and all attempts to regulate procreative behavior,

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<sup>39</sup>Press Release, Ctrs. for Disease Control & Prevention, *Child Abuse and Neglect Cost the United States \$124 Billion* (Feb. 1, 2012), [www.cdc.gov/media/releases/2012/p0201\\_child\\_abuse.html](http://www.cdc.gov/media/releases/2012/p0201_child_abuse.html).

<sup>40</sup>Joan Callahan, *Contraception or Incarceration: What's Wrong with This Picture?*, 7 *Stan. L. & Pol'y Rev.* 67, 75 (1996); Joseph R. Tybor, *Does Sterilization Fit the Crime? Woman Must Decide*, CHI. TRIB., Sept. 25, 1988, at 4C (quoting law professor Daniel Polsby): "The state takes kids away from unfit parents all the time. What is proposed here is not the taking away of children that actually exist, but those who don't exist and, arguably, that's less invasive than removing a natural child from its parents."

<sup>41</sup>*Brock v. State*, 688 So. 2d 909, 911–12 (Fla. 1997).

<sup>42</sup>See Section III *infra*, for discussion of Fair Start Orders and gender.

<sup>43</sup>Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 *Ga. St. U. L. Rev.* 639, 651 (2014).

especially behavior that constitutes flagrant disregard for the welfare of offspring.”<sup>44</sup>

It should go without saying that institutional racism, classism, and sexism are far from being relics of the past. For starters, the broader criminal justice system consistently favors the white and the wealthy.<sup>45</sup> Additionally, the child welfare system itself has been criticized for persistent racial and class bias.<sup>46</sup> One study found that that child abuse was less likely to be recognized in white children from two parent families than children from Black and single-parent families.<sup>47</sup> Scholar Dorothy Roberts concluded that prosecutions of drug-addicted pregnant Black women “are better understood as a way of punishing Black women for having babies rather than as a way of protecting Black fetuses.”<sup>48</sup>

Nonetheless, recognizing the glaring flaws of the existing system cannot justify throwing up our hands and allowing the most vulnerable among us to be abused and neglected. As family law scholar Naomi Cahn notes:

The racism and sexism of the criminal justice system, however, do not mean that children are not getting hurt— children are being

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<sup>44</sup>See Pearson, *supra* at fn. 8.

<sup>45</sup>See generally Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 267-72 (2007); Justin Murray, *Reimagining Criminal Prosecution: Toward A Color-Conscious Professional Ethic for Prosecutors*, 49 Am. Crim. L. Rev. 1541, 1549 (2012); Dan M. Filler, *Silence and the Racial Dimension of Megan’s Law*, 89 Iowa L. Rev. 1535 (2004).

<sup>46</sup>Susan Brooks & Dorothy Roberts, *Family Court Reform*, 40 Fam. Ct. Rev. 453, 453 (2002); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 299, 309-10 (2013) (noting that because of poor women’s perceived failure to conform to traditional expectations of motherhood, they are subjected to heightened forms of scrutiny by medical staff and more often referred to law enforcement for investigation.); *but see* Elizabeth Bartholet, *Creating A Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 Buff. L. Rev. 1323, 1327 (2012) (noting studies that found that while “black children were, in fact, maltreated at much higher rates than white children, as would be expected given socioeconomic differences between black and white families and other established predictors for maltreatment...official reporting and removal rates closely tracked actual maltreatment rates, indicating that while there might be pockets of discrimination within the system operating in different racial directions, there was no overall pattern of discrimination”).

<sup>47</sup>Carole Jenny, M.D. et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 JAMA 621, 621 (Feb. 17, 1999).

<sup>48</sup>Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (1997).

neglected, abused, and killed by their caretakers. Childhood, while the topic of elegiac moralizing, is nonetheless deprivileging because children simply cannot speak for themselves.<sup>49</sup>

Indeed, child abuse and neglect prosecutions are unique from prosecutions for other criminal offenses, since, in the vast majority of cases where the offender is a person of color and/or a poor person, the victim is as well. Consider also the evolution of domestic violence policy over the last decades: many of the same racial and class biases affect the way in which domestic violence is prosecuted, with feminist scholars having identified how aggressive policing of domestic violence disproportionately affects people of color.<sup>50</sup> And yet, “despite the drawbacks of excessive criminalization and separation, the feminist revolution of DV law has brought significant benefits to many women”<sup>51</sup>; the same is necessarily true of Fair Start orders and the potential benefits to future children saved from neglect and abuse.

Short of abolishing the current criminal justice system entirely,<sup>52</sup> what is left is to navigate the current version to best protect the most vulnerable among us, and poor children of color in particular in manner that does not discriminate. In order to protect against class discrimination, legislative authorizations of Fair Start orders should include a poverty exemption in cases of neglect,<sup>53</sup> which should in turn help to prevent orders being used as tools of

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<sup>49</sup>Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DePaul L. Rev. 817, 825 (2000)

<sup>50</sup>Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1047 (2000).

<sup>51</sup>Claire Houston, *What Ever Happened to the “Child Maltreatment Revolution”?*, 19 Geo. J. Gender & L. 1, 40 (2017).

<sup>52</sup>See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 261 (2007). This article does not take a position one way or the other on the merits of total abolition, but it does presume that the current system will remain in operation for the foreseeable future.

<sup>53</sup>A minority of states and the District of Columbia already include a poverty exemption in their definition of child abuse and neglect. Ark. Code Ann. § 12-18-103(14)(A)(Ii); D.C. Code § 16-2301(9)(A)(Ii); Fla. Stat. Ann. § 39.01(30)(F); Kan. Stat. Ann. § 38-2202(D)(1); La. Child. Code Ann. Art. 603(18) (2014); N.H. Rev. Stat. Ann. § 169-C:3(Xix)(B) (2014); N.D. Cent. Code Ann. § 27-20-02(8)(A); 23 Pa. Cons. Stat. Ann. § 6304(A); Tex. Fam. Code Ann. § 261.001(4)(B)(Iii); Wash. Rev. Code Ann. § 26.44.020(16); W.Va. Code Ann. § 49-1-3(11)(A)(I); Wis. Stat. Ann. § 48.02(12g). For example, the District of Columbia’s statute for child abuse and neglect states that “[t]he term ‘negligent treatment’ or ‘maltreatment’ means failure to provide [a child with] adequate food, clothing, shelter, or medical care, which includes medical neglect,

racial oppression, since people of color make up a disproportionate number of the nation's poor. Orders should also heed calls for "color-conscious" law enforcement and prosecution.<sup>54</sup>

*Orders should leave the method of birth control to the discretion of the parent*<sup>55</sup>

#### B. A MODEL FAIR START ORDER

Plaintiff, v. Defendant.

Case No. \_\_\_\_\_ Judge \_\_\_\_\_ JUDGMENT ENTRY

#### MODEL ORDER ADDITIONAL CONDITION[S] OF [COMMUNITY CONTROL/PROBATION]

Adults possess a presumptive right to conceive children. This right diminishes when one has borne one or more children and severely abused or neglected them. The right may be suspended temporarily to fulfill the state's compelling interest in protecting future children, and to protect defendant's interest in successful rehabilitation. Defendant's criminal conviction for child maltreatment is clear evidence of unfitness to parent at this time. To release Defendant into the community now would risk creating a situation in which another child is in danger of similar maltreatment at Defendant's hands. That risk is sufficient reason for the state to refuse Defendant's request for [community control/probation]. Thus, this court operates within its proper discretion by granting Defendant's request only conditionally, contingent upon Defendant's acting to avoid that risk, as it might do with any other risk posed by a convicted criminal.

As an additional condition of [community control/probation] this court hereby orders Defendant to avoid [impregnating a woman/becoming pregnant] during the duration of the [community control/probation] period.

Violation of this order will result in [extension of the [community control/probation] period, and order requiring

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and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian." See D.C. CODE § 16-2301(24).

<sup>54</sup>See generally Justin Murray, *Reimagining Criminal Prosecution: Toward A Color-Conscious Professional Ethic for Prosecutors*, 49 Am. Crim. L. Rev. 1541, 1541 (2012).

<sup>55</sup>See *supra*, note 43.

community service, revocation of probation and additional actions by this court to ensure the Defendant's rehabilitation, etc.]

This order is reasonably related to Defendant's offense, risk of future re-offense, and necessary rehabilitative efforts, which will require devoting substantial time to counseling and other services targeting Defendant's demonstrated propensity for maltreating children.

This order serves the State's compelling interests in preventing harm to future children. Further, this order in no way requires or condones abortion in the event of a pregnancy during the course of the order's applicability.

This condition is effective upon service of a copy of this order upon Defendant.

IT IS SO ORDERED.

#### IV. FAIR START ORDERS AND FEMINISM

Philosopher John Stuart Mill lamented a century and a half ago that "misplaced notions of liberty prevent moral obligations on the part of parents from being recognized, and legal obligations from being imposed, where there are the strongest grounds for the former always, and in many cases for the latter also."<sup>56</sup> According to Mill, the state's responsibility necessarily extended to prospective children as well because, "to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind is a moral crime, both against the unfortunate offspring and against society."<sup>57</sup>

Given that studies continue to link child abuse to poor family planning,<sup>58</sup> as well as the egregious failure of our after-the-fact public child welfare systems,<sup>59</sup> Mill's argument resonates even more strongly today. And yet, major organizations such as Amnesty

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<sup>56</sup>John Stuart Mill, *On Liberty* 103 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

<sup>57</sup>*Id.*

<sup>58</sup>Kai Guterman, *Unintended pregnancy as a predictor of child maltreatment*, 48 *Child abuse & neglect* 160-169 (2015).

<sup>59</sup>Children's Advocacy Inst. & First Star, *Shame on U.S.: Failings by All Three Branches of Our Federal Government Leave Abused and Neglected Children Vulnerable to Further Harm* 29 (2015).

International,<sup>60</sup> and the Center for Reproductive Rights,<sup>61</sup> insist that procreative rights must always be absolute and unlimited, even when that unlimited right all but ensures that a child will be born to grossly negligent or abusive parents.<sup>62</sup>

The refusal of otherwise progressive organizations and thinkers to even consider the interests of children may be traced to the conflation of the rights to have and not have children, which is itself a corollary of a conflation of the pronatalist status quo with feminism. Indeed, commitment to absolute procreative rights has become a “moral bulldozer” that invariably “crushes all competing interests,” even when those interests include a future child’s fundamental interest in avoiding severe abuse and neglect.<sup>63</sup>

#### A. THE FEMINIST CASE FOR ISSUING FAIR START ORDERS TO BOTH MEN AND WOMEN

“From a feminist perspective, unlimited procreative liberty risks treating children as property, distorts understanding of the family, and neglects moral concerns about how we reproduce.”<sup>64</sup> That is, “to confuse procreative with non-procreative sexual interaction, and to assume that the same rules apply in both sorts of cases, is to ignore the obvious fact that procreation leads to the existence of a child whose interests must be considered and whose creation will have an impact on society.”<sup>65</sup>

As a result of the conflation of the rights of nonprocreation and procreation, the right to procreate is “one of those moral rights that has been more assumed than argued for...where procreation is

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<sup>60</sup>Amnesty international, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/> (“Sexual and reproductive rights mean you should be able to make your own decisions about your body and:...decide if you want to have children and how many”).

<sup>61</sup>Center for Reproductive Rights, [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRa\\_reHR\\_final.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRa_reHR_final.pdf) (listing among the twelve human rights key to reproductive rights “The Right to Decide the Number and Spacing of Children”).

<sup>62</sup>One scholar has gone so far as to argue that children can *never* be harmed by being born, regardless of the brutality of the conditions in which they enter the world. See David Heyd, *Genethics: Moral Issues in the Creation of People* 61 (1992).

<sup>63</sup>Laura M. Purdy, *Children of Choice: Whose Children? At What Cost?*, 52 Wash. & Lee L. Rev. 197, 199–202 (1995).

<sup>64</sup>Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, Hastings Center Rep., July-Aug. 1990, at 6.

<sup>65</sup>Pearson, Yvette E. *Storks, cabbage patches, and the right to procreate*. *JOURNAL OF BIOETHICAL INQUIRY* Inquiry 4.2 (2007): 105-115, 109.

widely understood as being so fundamental to human existence—individually or as a species—that it does not require any argument in its defense.<sup>66</sup> And linking the right to procreate so closely with the concept of the self and identity can be dangerous, as bioethicist Laura M. Purdy notes:

[T]his model of the self encourages people to see the decision to have children primarily as a personal decision about themselves and not as a moral decision affecting others. This moral dimension of childbearing is obscured by the emphasis on self-creation, which makes it almost impossible to discuss, let alone construct, moral standards. Thus, it is hardly possible to talk about such matters as wrongful life or overpopulation without seeming to violate the individual's most intimate self.<sup>67</sup>

For the same reason that “the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor,”<sup>68</sup> absolute procreative freedom frequently protects the interests of those more powerful parties to the procreative equation.<sup>69</sup> In this way, feminist theory regarding the operation of power dynamics practically begs for Fair Start orders as a means of protecting future children from abusive men *and* women, with children being the most vulnerable and “subordinated” group.<sup>70</sup>

#### B. THE FEMINIST CASE FOR ISSUING FAIR START ORDERS SOLELY TO MEN

The early versions of Fair Start orders targeted mostly women, both because, biologically speaking, it is easier to verify a female probationer's compliance with the order, and because women are

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<sup>66</sup>*Id* at 106.

<sup>67</sup>Purdy, *supra* note 63.

<sup>68</sup>Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 101 (1987); *see also* Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* (2002) (noting the inadequacy of a privacy concept that merely ensures the right to be let alone, as it fails to protect the more vulnerable groups, and calling instead for a formulation of privacy as a “fundamental right to equal liberties”).

<sup>69</sup>*See* Ryan, *supra* note 64 (“From a feminist perspective, unlimited procreative liberty risks treating children as property, distorts understanding of the family, and neglects moral concerns about how we reproduce”).

<sup>70</sup>*See, e.g.*, Claire Houston, *What Ever Happened to the “Child Maltreatment Revolution”?*, 19 *Geo. J. Gender & L.* 1, 41 (2017) (positing that the feminist critique of family privacy would seem to highlight the role that the state's family preservation efforts and noncriminal intervention play in children's subordination and therefore maltreatment).

almost six times more likely than men to be custodial parents.<sup>71</sup> As a result, there are simply many more opportunities for women to neglect their children than for men.<sup>72</sup> This disparity is then exacerbated by the fact that the justice system tends to hold mothers to a higher standard than fathers because of ingrained societal expectations that mothers should bear the responsibility for childrearing.<sup>73</sup>

And yet, despite spending substantially less time on average caring for children than women, men are nearly twice as likely to commit criminal acts of violence against their children.<sup>74</sup> Worse yet, “male battering of women often escalates during pregnancy and causes more birth defects than all the diseases for which children are commonly inoculated.”<sup>75</sup> As a matter of biology, men have the capacity to conceive more children than women, such that an abusive man could father several children during even a short probationary period. These distinctions between men and women could likely justify limiting Fair Start Orders to male probationers under intermediate scrutiny.<sup>76</sup>

From a theoretical standpoint, one could also reasonably argue that only men truly enjoy absolute procreative rights in our patriarchal, pronatalist society, and therefore, that the case for placing some limitation on procreative rights is strongest as to men. That is, even if ostensibly free to choose whether to have children and in what amount, women still reside in a patriarchal system that favors reproduction over delayed childbearing and childlessness.<sup>77</sup>

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<sup>71</sup>Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DePaul L. Rev. 817, 819 (2000).

<sup>72</sup>Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, (Wake Forest University School of Law Research Paper Series No. 05-08, 2005), <http://ssrn.com/abstract=673451>.

<sup>73</sup>Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 584 (1997) (“When fathers are involved in the proceedings, they are usually subject to lower expectations and are significantly less likely to be criminally charged with neglect or passive abuse of their children”).

<sup>74</sup>See, e.g., Demie Kurz, *Corporal Punishment and Adult Use of Violence: A Critique of “Discipline and Deviance”*, 38 SOC. PROBS. 155, 159 (1991); Leslie Margolin, *Beyond Maternal Blame: Physical Child Abuse as a Phenomenon of Gender*, 13 J.Fam. Issues 410, 418-19 (1992).

<sup>75</sup>Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 Cardozo L. Rev. 1747, 1766 (1993) (citing Nancy Gibbs, ‘Til Death Us Do Part, TIME, at 38, 41 (Jan. 18, 1993).

<sup>76</sup>*Craig v. Boren*, 429 U.S. 190, 218 (1976).

<sup>77</sup>See Paddy McQueen, *Autonomy, age and sterilisation requests*. J. OF MED. ETHICS (2016).

Logically, the dangerous effects of patriarchy and power do not suddenly disappear with unlimited procreative rights, and it is no wonder then, that “those who do not wish to mother are often treated with disbelief or viewed as slightly pathological when they claim to want a ‘childfree’ life.”<sup>78</sup>

In truth, absolute procreative rights, as filtered through patriarchy, ends up promoting a woman’s choice *only when it corresponds with a man’s preference*: in this upside down, pronatalist framework, a 29 year old woman, for four years, was unable to find a doctor willing to sterilize her in accordance with her desire not to procreate (under the guise of protecting her from a decision she might later regret),<sup>79</sup> whereas a child-bride receives IVF treatment at a major university hospital center (under the guise of “respecting the patient’s mentality and cultural norms”).<sup>80</sup> Moreover, why are we more concerned that an adult who chooses to be sterilized might someday come to regret the decision<sup>81</sup> (thereby affecting the welfare of *zero* children), than we are that a teenager who *permanently* creates another life might someday wish she had waited until she was fully mentally developed herself, particularly since children with older mothers—regardless of their parents’ background, education and finances—have fewer behavioral, social and emotional problems?<sup>82</sup>

Given the nuanced arguments that may be raised on both sides, this Article leaves open the question of whether Fair Start orders

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<sup>78</sup>Kristin J. Wilson. *Not trying: Reconceiving the motherhood mandate*. Georgia State University, 2009; see also Laurie Lisle, *Without Child: Challenging the Stigma of Childlessness* 235 (1999) (observing that “[a]s long as a female is young and unmarried, her childlessness is unquestioned, even honored, since she represents the virgin archetype. When it is a matter of considered choice, however, the reaction is often different. The attractive lover of man, the Aphrodite or mistress type, is usually tolerated. But a nullipara who is old, isolated, or angry, or who is not sexual or maternal, runs the risk of being regarded as an anti-mother or an imperfect male and being cast out of the human family”).

<sup>79</sup>Brockwell, Holly, *The Guardian*, “Why can’t I get sterilized in my 20s,” January 28, 2015.

<sup>80</sup>Callaway, Ewen, *New Scientist*, “Interview: Why I gave a teenager IVF,” (May 9, 2008), available at <https://www.newscientist.com/article/dn13867-interview-why-i-gave-a-teenager-ivf/> (last visited March 19, 2019).

<sup>81</sup>In fact, studies have shown that IVF can work after sterilisation.

<http://www.scientificamerican.com/article/ivf-baby-possible-after-tubal-sterilization/> (last visited March 19, 2019).

<sup>82</sup>Tea Trillingsgaard, Dion Sommer. Associations between older maternal age, use of sanctions, and children’s socio-emotional development through 7, 11, and 15 years. *European Journal of Developmental Psychology*, 2016; 1 DOI: 10.1080/17405629.2016.1266248

should issue solely for men. Jurisdictions may reasonably decide one way or the other, so long as they do so with an awareness of the ways in which sexism and patriarchy will necessarily affect, and frankly, infect, the way in which procreative rights are exercised.

#### **V. THE MODEL FAIR START ORDER ACCORDS WITH THE HUMAN TO FOUND A FAMILY**

Under Article 23(2) of the International Covenant on Civil and Political Rights, the Covenant recognizes “[t]he right of men and women of marriageable age to marry and to found a family.” The United Nations Human Rights Committee notes that, “the right to found a family implies, in principle, the possibility to procreate and live together.”<sup>83</sup> Given that one has procreated after having a first child, the Committee interpretation should reasonably imply a limited right, such that the right to found a family does not include the right to have as many children as a person wishes (particularly after having neglected or abused previous children); the limiting of the right to found a family necessitated by the balancing of other human rights in the Covenant appear to support such an interpretation.

As a preliminary matter, unlike other rights contained in the Covenant, the right to found a family can be derogated, *see* art. 4, and lacks the stipulation common to other rights that it not be unlawfully restricted. *See e.g.*, art. 22 ¶¶ 1-2 (stipulating, in the context of “the right to freedom of association with others,” that “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law”). The right to “found a family” under the Covenant is even further limited by competing rights and correlative duties as declared in article 5: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); *see also* Universal Declaration of Human Rights, arts. 29, 30 (recognizing that rights must necessarily be limited by others’ rights and by the general welfare).

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<sup>83</sup>U.N. Human Rights Committee, General Comment No. 19, art. 23 (Thirty-ninth session 1990) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 107, U.N. Doc. HR1/GEN/1/REV. 4 (2000).

Chief among these competing rights in the Covenant is article 24(1), which entitles every child “to such measures of protection as are required by his status as a minor on the part of his family, society and the State.” As the Committee notes in its General Comment on Article 6, these “special measures of protection...should be guided by the best interests of the child, by the need to ensure the survival and development of all children, and their well-being.” The Committee also recognizes in its General Comment that the right to life for children and adults alike “depends on measures taken by States parties to protect the environment against harm and pollution.”<sup>84</sup>

Since the right “to found a family” must be interpreted so as not to abrogate competing rights, it must therefore be balanced against the prospective child’s right to life. Human rights are all constructed and limited in order to improve human wellbeing, not diminish it, which is why the Universal Declaration of Human Rights specifically recognizes that one person’s rights may be limited by others’ competing rights and/or in the interest of the general welfare.

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<sup>84</sup>In contrast to ICCPR Article 23(2)’s vague and arguably satiable right “to found a family,” the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) requires signatories to ensure that men and women have “[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”<sup>159</sup> However, the modifier “responsibly” necessarily demonstrates that any such right is not unlimited. *See also* Dillard, *Prospective Parents and the Children’s Rights Convention*, 25 Am. U. Int’l L. Rev. 485, 523 (2010) (arguing that “CEDAW does not create any new rights, but rather seeks to bolster rights already provided by the UDHR, ICCPR, and ICESCR. Put more simply, CEDAW should not be interpreted as creating a broader right to procreate for women than that enjoyed by men, but should instead be read as establishing parity between the two genders.”). In other words, CEDAW itself recognizes that absolute procreative freedom does not exist in a vacuum, but it fails to meaningfully address the problem. As for nonbinding sources of international law, they, too, appear to implicate a broader procreative right than “founding a family,” but these nonbinding sources also qualify a parent’s right to have as many children as she wishes by specifying the manner in which that right should be exercised. *See* United Nations: Report of the International Conference on Population and Development, UN Doc No A/CONF.171/13, Cairo, Egypt, 5–13 September 1994 (18 Oct 1994) (“In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities toward the community.”); *see also* Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) (“Parents have a basic human right to determine freely and responsibly the number and spacing of their children...”) (emphasis added).

In this way, the Model Fair Start order is best understood as a balancing mechanism that best protects all human rights, as opposed to some brazen attack on procreative rights. And balancing is sorely needed, with one commentator going so far as to subordinate a child's interest in avoiding neglect and abuse to the ticking biological clocks of older child abusers,<sup>85</sup> and others, while acknowledging the high recidivism rates among perpetrators of child abuse and neglect, insisting that because recidivism is less than 100%, the true danger lies in the possibility that the probationer would erroneously be deprived of the right to procreate during the rehabilitative period (contemplating that or she may have turned out to be within the minority of offenders that would not have abused or neglected the additional child).<sup>86</sup>

#### **VI. FAIR START ORDERS AS A STEPPING STONE TO A LEGITIMATE HUMAN RIGHTS BASED FAMILY PLANNING MODEL**

In the United States, the patriarchal preference for women as reproductive vessels is reflected in specific pronatalist policies, particularly of late, among them defunding teen pregnancy programs, severely limiting family planning abroad, and rolling back the ACA birth control mandate, which disproportionately harms poor women and women of color.<sup>87</sup> Within this pronatalist framework, absolute procreative rights may easily be transformed into tools that actually hurt those most vulnerable by restricting

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<sup>85</sup>See Joanna Nairn, *Is There A Right to Have Children? Substantive Due Process and Probation Conditions That Restrict Reproductive Rights*, 6 Stan. J. Civ. Rts. & Civ. Liberties 1, 31–32 (2010) (lamenting the effect of temporary procreative restrictions on “probationers who are at the upper end of reproductive age when sentenced will be unable to have children by the time their sentence ends,” as well as decrying that “[s]ome women, determined to have additional children despite the inability to do so during their probationary period, might even face increased health risks as they seek to maintain a pregnancy at a later age.”)

<sup>86</sup>Emily Campbell, *Birth Control As A Condition of Probation for Those Convicted of Child Abuse: A Psycholegal Discussion of Whether the Condition Prevents Future Child Abuse or Is A Violation of Liberty*, 28 Gonz. L. Rev. 67, 102 (1992) (acknowledging, “[w]hile it is true that predictive ability of less than 100% is not necessarily constitutionally suspect...the cost to the parent is great because she will be denied the right to have additional children.”)

<sup>87</sup>Melissa Murray, *Intimate Choices, Public Threats—Reproductive and LGBTQ Rights under a Trump Administration*, 376.4 New England Journal of Medicine 301-303 (2017).

women to traditional gender roles,<sup>88</sup> exacerbating income inequality with a glut of cheap laborers,<sup>89</sup> and depriving future generations of children a fair start in life.

Fortunately, despite the predominance of the pronatalist family planning framework, there is a growing recognition of a need for policies that focus on delayed childbearing, and smaller families in particular, both as investments in the environment,<sup>90</sup> investments in the economy,<sup>91</sup> and investments in children.<sup>92</sup> And since it is in the context of serious child abuse and neglect cases that the horrific consequences of pronatalism become most stark, it is in this context that widespread norm change is most likely.

Of course, such a foundational change in the way we plan families will require a multipronged approach. Thus, advocacy for Fair Start orders should be accompanied by calls – including by courts – for specific legislation, funding, and resource reallocations that address the underlying problem in family planning: The need to eliminate inequality in a way that moves towards giving every child a fair start in life, with opportunities equal to the opportunities enjoyed by other children in their generation. This could include, for example, a guaranteed minimum income for children<sup>93</sup> and the establishment of trust fund for each child born to low-income parents, as well as increased investments in more progressive family planning measures such as long-acting reversible contraception

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<sup>88</sup>Judith Blake, *Coercive Pronatalism and American Population Policy: Judith Blake*. International Population and Urban Research, University of California, in: Ellen Peck and Judith Senderowitz, eds., *Pronatalism. The myth of mom and apple pie* (Thomas Y. Crowell, New York (1974).

<sup>89</sup>Jacquelin Thomsen, *Wisconsin state lawmaker suggests banning abortions to add to labor force*, The Hill (Nov. 4, 2017), available at <http://thehill.com/blogs/blog-briefing-room/news/358806-wisconsin-state-lawmaker-suggests-banning-abortions-to-add-to>

<sup>90</sup>Jiang, Leiwen, and Karen Hardee. “How do recent population trends matter to climate change?.” Population Action International (2009). [http://sciencepolicy.colorado.edu/students/envs\\_5720/jiang\\_hardee\\_2009.pdf](http://sciencepolicy.colorado.edu/students/envs_5720/jiang_hardee_2009.pdf)

<sup>91</sup>Bongaarts, John, and Steven W. Sinding. “Family planning as an economic investment.” *SALS Review of International Affairs* 31.2 (2011): 35-44. [http://www.populationmatters.org/documents/economic\\_investment.pdf](http://www.populationmatters.org/documents/economic_investment.pdf);

<sup>92</sup>Child Endowments and the Quantity and Quality of Children Author(s): Gary S. Becker and Nigel Tomes Source: *The Journal of Political Economy*, Vol. 84, No. 4, Part 2: Essays in Labor Economics in Honor of H. Gregg Lewis (Aug. 1976), pp. S143-S162 Published by: The University of Chicago Press Stable URL: <http://www.jstor.org/stable/1831106>

<sup>93</sup>See e.g., Chris Weller, *San Francisco is launching an experiment to give families free money*, Business Insider (Jan. 26, 2017) <https://www.businessinsider.com/san-francisco-basic-income-experiment-announcement-2017-1>

(LARC) pilot programs,<sup>94</sup> and male contraception (the progression of which has been delayed in no small part by sexism<sup>95</sup>).

While only a preliminary step, the implementation of the Model Fair Start Order would begin to shift the family planning paradigm to one that better protects a child's right to a fair start in life, transforming vicious cycles into virtuous ones: after all, the child who receives a fair start in life is necessarily better equipped to provide her potential future child with a fair start someday.

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<sup>94</sup>Popvich, Nadja, *Colorado contraception program was a huge success – but the GOP is scrapping it*, The Guardian (May 6, 2015).

<sup>95</sup>Natasha Bird, *Male Contraceptive Injection Halted For Same Side Effects Women Have Suffered For Years*, Elle.com, (Oct. 28, 2016), available at <https://www.elle.com/uk/life-and-culture/news/a32487/male-contraceptive-injection-halted-for-same-side-effects-women-have-been-expected-to-suffer-for-years/> (last visited March 19, 2019).