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COERCIVE ABORTIONS AND CRIMINALIZING THE BIRTH OF CHILDREN: SOME THOUGHTS ON THE IMPACT ON WOMEN OF *STATE V. OAKLEY*

JENNIFER MARTIN*

> "[P]rohibiting a person from having children as a condition of probation has been described as 'coercive of abortion.'"[1]

The societal dilemma imposed by "deadbeat" parents is recited in media headlines[2] on a sufficiently regular basis for most to see that the institutional arrangements for the provision and collection of child support payments do not always work. From the five billion dollars in child support payments that went unpaid in 2000[3] to the number of single parents, most often mothers, in poverty,[4] we seem to have produced a child support establishment that consumes enormous resources even as it fails to produce financial resources for children. Matters would be bad enough if the problem of child support collection was limited to the financial sphere. Unfortunately, that turns out not to be the case here. To this failure—and that is not too strong a term—of the government generally and the judicial system to respond to the need to support children, we compound additional lessons and failures in the arena of procreation.

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1. State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) (citing to People v. Pointer, 199 Cal. Rptr. 357 (1984)).

2. *E.g.*, Marilyn Gardner, *Making 'Deadbeat' Parents a Thing of the Past*, CHRISTIAN SCI. MONITOR, Aug. 28, 2002, at 16; Abraham McLaughlin, *Bush's Controversial Bid to Promote Marriage*, CHRISTIAN SCI. MONITOR, June 4, 2001, at 1; Elaine Sorensen & Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?* (April 2001) *available at* www.urban.org/url.cfm?ID=310334 (last visited July 1, 2004); Silja A. Talvi, *'Deadbeat Dads' – or just 'dead broke'?*, CHRISTIAN SCI. MONITOR, Feb. 4, 2002, at 20; Cathy Young, *New Look at 'Deadbeat Dads,'* BOSTON GLOBE, Feb. 11, 2002, at A15.

3. Talvi, *supra* note 2, at 20.

4. Sorensen & Zibman, *supra* note 2.

The right to procreate has been invaded many times previously for many purportedly positive goals, such as deterring sexual activity of minors, deterring criminal conduct, encouraging marriage and not allowing those who neglect or abuse children to have custody of children in the future. Prosecutors may claim that perhaps they are onto something after all by adopting the tactic of prohibiting individuals who are delinquent in their child support payments from having additional children to serve the goal of providing for children already in existence.

At the same time, experience has certainly taught us that classes of individuals, especially women, are often disproportionately adversely impacted by otherwise seemingly otherwise effective rules.[5] As Justice Blackmun observed: "[T]he women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[6] Intertwining child support collection and reproductive rights immediately should raise concerns to those attuned to women's issues as a potential for adverse impact and perhaps mischief.

That child support collection should find itself at all governed by the sort of rules originally aimed at deterring classic criminal conduct and wind up in the hands of criminal prosecutors is in itself surprising since debtor's prison was abolished primarily in the nineteenth and twentieth centuries.[7] Debt collection, after all, has his-

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5. *See, e.g.*, People v. Zaring, 8 Cal. App. 4th 362, 374 (1992) (overturning probation condition imposed by lower court that defendant not become pregnant during probation concluding the ban was illegal and an imposition of social values best left to the legislature); People v. Dominquez, 256 Cal. App. 2d 623, 627 (1967) (overturning probation condition imposed by lower court that defendant not become pregnant unless she is married because future pregnancy was unrelated to robbery for which she was convicted); Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979) (partially overturning probation condition imposed by lower court that defendant not marry without the court's consent, not have custody of any children and not become pregnant, striking the marriage and pregnancy provisions, but upholding the restriction on custody of children); State v. Mosburg, 13 Kan. App. 2d 257, 260 (1989) (overturning probation condition imposed by lower court that defendant not become pregnant because the condition regarding contraception lies within the constitutional rights to privacy and the defendant would have to choose between concealment, abortion or incarceration); State v. Norman, 484 So. 2d 952, 953 (La. Ct. App. 1986) (overturning probation condition imposed by lower court that defendant "not give birth to any children outside wedlock" during probation because it did not bear sufficient relationship to her crime of forgery, relates to conduct not in and of itself criminal and requires marriage, forbids extramarital sex or mandates contraception).

6. Webster v. Reprod. Health Servs., 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., concurring in part and dissenting in part).

7. 28 U.S.C. § 2007 (2000); Richard James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J.

torically functioned for many years as a civil part of the American justice system. The protections afforded individuals under federal law to ensure fair debt collection are formidable.[8] Clearly, wage garnishment, liens on property, interception of tax refunds and even civil contempt are available to collect child support just as they are to collect any unpaid, due and owing debt.[9] But now there is also the availability of criminal sanctions for the non-payment of this specific debt, child support, under certain circumstances specified in the applicable state or federal law. And now, the extension of this debt collection includes the additional criminal law remedy of criminalizing the birth of children, that is, making it a crime for some individuals who fail to pay child support to have additional children. This amounts to "basically a compulsory, state-sponsored, court-enforced financial test for future parenthood."[10]

The Supreme Court has protected the right to procreate as a "basic liberty" under the Due Process Clause of the Fourteenth Amendment to the Constitution that is "fundamental to the very existence and survival of the [human] race."[11] Once a person is convicted of a crime, however, "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to [the probationer's] rehabilitation."[12] Reasoning that it was not shocking that the legislature attached severe sanctions to non-payment of child support "[i]n view of the suffering children must endure when their noncustodial parent intentionally refuses to pay child support"[13] and that the restriction on procreation would prevent Oakley from violating the law again by "adding victims if he were to continue to intentionally refuse to support his children,"[14] the *Oakley* court concluded that the condition was reasonably related to the goal of rehabilitation and, therefore, the right to procreate could be limited or even eliminated to

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143, 148 (Fall 2002), (citing Michael M. Conway, Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 (1971)) (all fifty states now outlaw incarceration for debt)).

8. *See* Fair Debt Collection Act, 15 U.S.C. § 1601 (2000).

9. *See generally* Teresa A. Myers, *State Child Support Programs: Necessity Inspires Ingenuity*, State Legislative Report, Nov. 1998, Vol. 23, No. 20, *available at* www.ncsl.org/programs/cyf/csslr.htm (last visited July 1, 2004) (discussing the creative ways to collect child support).

10. State v.Oakley, 629 N.W.2d 200, 221 (Wis. 2001) (Sykes, J., dissenting).

11. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

12. *Oakley*, 629 N.W.2d at 210 (quoting Edwards v. State, 246 N.W.2d 109 (1976)).

13. *Id.* at 204.

14. *Id.* at 213.

"assist Oakley in conforming his conduct to the law."[15] The more reasoned outcome, as Justice Ann Bradley of the Wisconsin Supreme Court in stated in her *Oakley* dissent, is that though "no right is absolute," "that premise does not justify making the basic human right to have children subject to financial qualification."[16] Justice Bradley concluded that because the right to procreate is a fundamental liberty, it is subject to heightened scrutiny, which she determined was not met where numerous narrowly drawn means of accomplishing the statutory objectives were available.[17]

Oakley is not Wisconsin's first foray into questionable limitations on individual rights to help ensure collection of child support payments. Previously, Wisconsin had by statute prohibited marriage of individuals who had a court-ordered child support obligation by prohibiting the issuance of marriage licenses without court approval.[18] In order to marry, such individuals had to demonstrate to a Wisconsin judge that they were complying with their current child support obligations and, additionally, that the existing children were not likely to become dependent on state assistance if the court permitted the marriage.[19] Not surprisingly, the United States Supreme Court found the statute to be an unconstitutional infringement on the right of individuals to marry and that less restrictive means could be used to accomplish Wisconsin's objective of providing for child support, such that the statute was not "closely tailored" to the state's interest.[20]

The reality is that the approach taken in *Oakley* might well produce "practical problems and carr[y] unacceptable collateral consequences"[21] that the majority of the Wisconsin Supreme Court did not anticipate. However, Justice Bradley clearly sees the perils that are presented from the court's decision.[22] Justice Bradley highlights the problems of coercive abortions, including those when a woman is the probationer and when a man in Oakley's position demands from a woman the termination of her pregnancy.[23] Two hypotheticals come to mind. Yes, the proverbial "what if" comes to mind too readily in this instance to create any comfort in thought.

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15. *Id.*
16. *Id.* at 221 (Bradley, J., dissenting).
17. *Id.* at 218.
18. Zablocki v. Redhail, 434 U.S. 374, 376 (1978).
19. *Id.* at 375.
20. *Id.* at 388.
21. *Id.* at 212 (Bradley, J., dissenting).
22. *Id.* at 219.
23. *Id.*

First, let's imagine David is married to Sarah. David, who makes $30,000 per year as a construction worker, has six children with other women and has historically been delinquent in his child support payments. Sarah is employed as a social worker and earns her own income. David (known or perhaps even unbeknownst to Sarah) previously pled no contest to the felony non-payment of child support. Although the court ordered David's probation for six years so that he could continue to work, the court also made it a condition of David's probation that he not have another child until and unless he could demonstrate that he could support that child and his existing children. Sarah becomes pregnant during their marriage. Although Sarah believes that she can support the child from her income as a social worker, David urges her to have an abortion as the birth of the child would result in a violation of his probation as he fears that he will be sent to prison to serve out his sentence. Sarah has always wanted a child and does not believe that abortion would be right for her. However, Sarah is also fearful that her husband will be sent to prison if she does not abort the pregnancy.

Second, Lucy was married to Richard. During the marriage, they had two children. Lucy is a survivor of Richard's domestic violence, and now lives in another state, but lost her children in a heated custody battle.[24] Richard still harasses Lucy regularly and is adamant that Lucy pay him the maximum amount of child support allowable by law and garnishes her wages. When Lucy falls $3000 behind on the child support payments due to some arrearages that were also imposed, Richard immediately runs to the prosecutors in his state and, when Lucy comes to visit her children, has Lucy ar-

24. It is not unusual for domestic violence victims to lose their children after leaving the batterer. *See, e.g.*, Smith v. Smith, 963 P.2d 24 (Okla. Civ. App. 1998) (reversing lower court award of custody to father who abused mother); Nat'l Org. of Women, *Legislative Update*, NEW RESOURCE KIT ON DOMESTIC VIOLENCE, CHILD CUSTODY (2003), *available at* www.now.org/issues/legislat/06-12-2000.html (last visited July 1, 2004) (women are often penalized by having custody taken away or given to a batterer); T.J. Sutherland, *High Conflict Divorce or Stalking by Way of Family Court? The Empowerment of a Wealthy Abuser in Family Court Litigation Linda v. Lyle - A Case Study*, MINN. CTR. AGAINST VIOLENCE AND ABUSE, *available at* www.mincava.umn.edu/reports/linda.asp (last visited July 1, 2004) (discussing family court lending itself to post-separation stalking, which can lead to a batterer getting custody of children, and in the case study a formerly sole custodian mother losing first custody of the children, and then being put on supervised visitation and eventually losing all contact with her children). *See also* Marilyn Gardner, *From Divorced Fathers, a Plea for Time With Kids*, CHRISTIAN SCI. MONITOR, June 8, 2001, at 1 (recounting the story of Elizabeth Stone whose ex-husband decided that if she wouldn't be his wife then she wouldn't be the mother of the children and managed to block even visitation).

rested for intentionally refusing to support her children, a felony. Lucy has no assets other than her wages, which are already being garnished. Richard insists that the Court impose the maximum prison sentence on Lucy for failure to pay. The court finds Lucy guilty of the felony, but orders probation and makes it a condition of probation that Lucy not have another child unless she can show that she can support that child and her current children. Due to Richard's continual harassment and now the felony conviction, Lucy loses her job. Lucy is now married to Peter and becomes pregnant. Lucy is pro-life, a devout Catholic, and believes that abortion is wrong. In fact, she believes it is a mortal sin and her parish priest has told her that she will be excommunicated and not welcome in church if she has the abortion. However, Lucy is also fearful of being sent to prison and losing all contact with her children if she does not abort the pregnancy. Lucy very much wants to have this child.

This may all appear extreme, but the law must be enforced equally against all individuals who pay child support and become delinquent. This would include mothers who don't have custody of their children for whatever reason. As more men fight for (and often get) custody of their children, women are ordered to pay child support and are now appearing on the lists of delinquent parents as child support evaders.[25] If the criminalizing of child support and child birth stands, it is only a matter of time before there will be an impact on women. That impact is the one contemplated by Justice Bradley in *Oakley*.

THE CLASH WITH ABORTION

> "Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[26]

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25. Several states regularly post on their webpage a list of parents who are most wanted for delinquency of child support. These lists now frequently include women. *See, e.g.*, State of Arizona Website, www.state.ar.us/dfa/childsupport/topten.html (last visited July 1, 2004); Los Angeles County Website, childsupport.co.la.ca.us/dlparents.htm (last visited July 1, 2004); Clark County, Indiana Website, www.clarkprosecutor.org/html/child/wanted.htm (last visited July 1, 2004); Delaware County, Ohio Website, www.delawarecountysheriff.com/dbdatabase.htm (last visited July 1, 2004); South Dakota Website, www.state.sd.us/social/CSE/Resources/MostWanted/poster.htm (last visited July 1, 2004); Commonwealth of Virginia Website, www.dss.state.va.us/family/wanted.html (last visited July 1, 2004); State of Washington Website, www.mostwanted.dshs.wa.gov/ (last visited July 1, 2004).

26. Roe v. Wade, 410 U.S. 113, 153 (1973). *See also*, Eisenstadt v. Baird, (1972) (noting that "[i]f the right of privacy means anything, it is the right of the individual,

On January 22, 1973, the Supreme Court in *Roe v. Wade* for the first time recognized that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[27] Judicial decisions since *Roe* have made it clear that this right to privacy is not an absolute one.[28] The impact of decisions like *Oakley* and its impact on a woman's right to privacy is an issue worth pondering here. Lying behind the important social issues surrounding the collection of past due child support and the criminalizing of the birth of children is the legality, morality and availability of abortion, an issue on which Americans are deeply divided.[29] As the Supreme Court aptly observed: "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."[30] The issues surrounding abortion are not likely to recede any time in the coming years. The decision in *Oakley* is apt to illustrate and aggravate existing issues if a woman is forced into making an abortion decision because of the risk of incarceration of herself or her part-

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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.")

27. *Roe*, 410 U.S. at 153.

28. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992) (noting that challenges to abortion restrictions must be a substantial obstacle to a woman's right to privacy before they become unconstitutional).

29. The debate was recently highlighted when a twenty-four week-old fetus was aborted to protect the mother after two weeks of legal drama, turning an unborn child of a disabled rape victim into a national symbol for anti-abortion activists. The twenty-eight year-old mother, originally from New Jersey, was deaf and mentally retarded with the skills of a four year-old. Carol Miller, *Disabled Rape Victim's Pregnancy Terminated*, MIAMI HERALD, May 30, 2003, at 1A. The woman's mother said that she felt "invisible" in her efforts to secure a life-saving abortion from her daughter. *Id.* This is similar to another Florida case involving an Orlando woman, this time twenty-two years old, which also rekindled the emotional debate over abortion. Associated Press, *Orlando Group Says Miami Disabled Woman Will Not Abort Fetus* (May 29, 2003), *available at* http://www.bradenton.com/mld/bradenton/news/local/5967490.htm (last visited July 1, 2003). An anti-abortion group, Liberty Council, claimed that it convinced the woman that she should not have an abortion even though there is a 30% chance that the disabled woman's fetus could suffer from neurological defects and it is uncertain whether the fetus could survive outside of the womb. *Id.* The president of the group, Mathew Staver, said, "We would rather see a baby have a shot at life than have no shot at all." *Id. See also* Ellen Goodman, *Lost Ironies of Florida Fetus Fight*, BOSTON GLOBE, May 25, 2003, at D11 (noting that the twenty-two year-old woman cannot understand how her body was transformed into a symbol by opponents of abortion).

30. *Roe*, 410 U.S. at 116.

ner, as in the case of the hypothetical Lucy or Sarah. What happens to the constitutional right to privacy for women?

Furthermore, presuming Lucy or Sarah get past the moral decision surrounding abortion and resolve to try and obtain an abortion to avoid jail time for her or her partner, the availability of abortion at any stage of a pregnancy has become ever increasingly difficult due to the repeated attacks on medical providers.[31] Both federal and state legislatures have been continually active in shaping the direction of the availability of legalized abortion.[32] Protests by opponents of abortion are common and oft-reported in the news media.[33] Court cases challenging access to abortion and the rights of

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31. In one recent incident, a flammable liquid was poured under Dr. Michael Benjamin's office door and through a mail slot but the fire burned itself out and no one was injured. Associated Press, *Fire in Office of Doctor who Advertises Abortion Services Ruled Arson* (May 30, 2003), *available at* www.cnn.com/2003/US/South/05/30/abortion.arson.ap/index.html (last visited July 1, 2004). Vicki Sapora, the president of the National Abortion Federation, said that this was the first abortion-related arson attack in this country this year. *Id.* Benjamin's office claimed that he is "Florida's most experienced abortion provider." *Id. See also* Phil Hirschkorn and Jamie Colby, *Anti-abortion Extremist Kopp Convicted of 1998 Slaying of Doctor*" (March 19, 2003), *available at* www.cnn.com/2003/LAW/03/18 /kopp.murder.trial/index.html (last visited July 1, 2004) (stating that an anti-abortion extremist who claimed he only meant to wound an abortion provider was convicted of second-degree murder for the doctor's 1998 sniper slaying).

32. *See, e.g.*, David Crary, *GOP Invokes Laci Case to Push Fetus Bill* (May 18, 2003), *available at* http://www.generationwoman.com/article.php3?story_id=204 (last visited July 1, 2004) (noting that Republicans in Congress are trying to enact the first federal law to endow a fetus with legal rights separate from the mother by invoking the Laci Peterson case); Jon Herskovitz, *Texas Readies for New, Restrictive Abortion Law* (May 22, 2003), available at news.yahoo.com/news?tmpl=story2cid=615&u=/nm/20030522/pl_nm/health_abortion (last visited July 1, 2004) (noting that Texas will soon have a new law requiring a twenty-four hour waiting period to have an abortion so that the woman can reflect on the information given to her, including that abortion may lead to breast cancer, which the American Cancer Society and the National Cancer Institute refute); John Mercurio, *Abortion Debate May Pivot Congress* (Jan. 23, 2003), *available at* www.cnn.com/2003/LAW/01/21/abortion.law.politics/index.html (last visited July 1, 2004) (explaining that thirty years after *Roe*, anti-abortion activists are optimistic that their agenda will be met by a Republican-controlled White House and Congress); Mannix Porterfield, *Both Sides will Have Say*, THE REGISTER-HERALD (May, 17, 2003), *available at* www.register-herald.com/articles/2003/05/17/news/zabortion18.txt (last visited July 1, 2004) (explaining West Virginia debate as to what will be included on the Department of Health and Human Resources informed consent website in state which compels abortion doctors to provide data on the physical and emotional risks and forces a twenty-four hour waiting period).

33. *See, e.g.*, William Lobdell, *Abortion Issue sets off dispute at L.A. College,* L.A. TIMES, May 7, 2003, at B1 (noting that members of anti-abortion Catholic groups plan to picket college graduation ceremonies when pro-choice congresswomen Loretta and Linda Sanchez speak at commencement); *Roe anniversary renews abortion debate*, (January 22, 1998), *available at* www.cnn.com/US/9801/22/abortion.anniversary/index.html (writing that Norma McCorvey, the plaintiff, Jane Roe, in *Roe v. Wade*, has changed her

individuals on both sides of the issue are a constant occurrence.[34] One might wonder where the Lucys and Sarahs living in Wisconsin are to even obtain their abortions even if they make a decision to bow to the control of the state on their reproductive rights.

What does *Oakley* mean for women and motherhood? Mothers may or may not be good people or even good mothers, but it is absurd for the state to order that a woman not conceive or bear a child, even if she is "an abysmally irresponsible parent, unless the State first grants its consent."[35] In fact, even the archetypical bad mother, the neglectful one or the one who might suffer from drug or other addictions, is not forced to abort her children. True, she might face intervention by social welfare and child protective agencies that might intervene and perhaps even take away her custody of the child, but nonetheless, she is still the mother of the child, typically entitling her to at minimum some parenting time with the child in all except the most extreme cases. Simply, the role of mother is respected and her right to parent and procreate is protected. These mother's flaws are often addressed by the relevant social agencies who try to educate the mother so that she can become a better parent and provide services that aim to protect her right to parent.

Yet, women that are impacted by the *Oakley* decision will be forced into decisions regarding abortion irrespective of their personal feelings, morals and beliefs about this controversial procedure. They will also be forced into these decisions irrespective of whether they will be able to support this or other children, and irrespective of whether they will be good mothers. Perhaps the *Oakley* decision can be summed up as "irrespective" of a woman's right to choose to procreate and her personal decision about abortion; unless, of course, she gets the government's permission to have a baby.

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mind about abortion, joined the anti-abortion group Operation Rescue, and become its leader).

34. *See, e.g.,* Associated Press, *Ruling by Justices Stirs Abortion Protest Debate* (Feb. 27, 2003), *available at* www.cnn.com/2003/LAW/02/27/scotus.abortion.protests.ap/ (last visited July 1, 2004) (noting that the high court rules that federal extortion and racketeering laws were wrongly used to thwart Operation Rescue and other abortion opponents); Associated Press, *U.S. Wants Court out of Abortion Case* (June 2, 2003), *available at* //abcnews.go.com/wire/Politics/ap20030602_1180.html (last visited July 1, 2004) (explaining that the Supreme Court asked the government's view about whether it should disturb the ruling against anti-abortion protestors for listing personal information about abortion clinic employees on the internet and on posters when the protestors were seeking free-speech protection).

35. State v. Oakley, 629 N.W.2d 200, 222 (Wisc, 2001) (Sykes, J., dissenting).

The woman who is behind on child support may not be a bad mother at all, but may have had financial or other problems that have inhibited full payment in the past. She may be a woman with no children of her own but who is partnered with a man who has had problems in the past with payment of child support. The possibilities are many. The result is the same, however, in that all of these women may be coerced into aborting a child in order to protect either themselves or their partner from incarceration. With no intention to minimize the importance of support obligations, the impact on personal rights in this case is severe when a woman is forced into abortion of a healthy fetus. It is virtually impossible to justify such an interference with women's reproductive rights without establishing a financial litmus test for all parents desiring to have children. The prosecutors who think that they are onto something good in terms of collecting child support and ensuring children are taken care of will now be in the position of deciding which mothers are allowed to bear children. This could well be a dark day for a woman's right to choose. Perhaps Justice Blackmun was the one that was onto something when he questioned whether women will retain control over their destinies and noted that "a chill wind blows."[36]

THE POTENTIAL EFFECT ON BATTERED WOMEN

> "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[37]

As a society we should be committed to ending violence against women and their children. Domestic violence has physical, emotional, psychological, economic and mental effects on the victims. Sometimes a battered woman is forced to defend herself by leaving the batterer and then faces a fierce battle for custody of her children, which she may, and often does, lose. When she leaves a batterer she may face a new challenge of stalking by way of family court when the batterer refuses to let go.

The seemingly never-ending stalking by way of family court wears down a battered woman's resources, emotional, economic and otherwise. Continued harassment and battering by the abusive

36. Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (Blackmun, J., concurring in part and dissenting in part).

37. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

ex-spouse may cause the woman to lose not only her children, but perhaps her job as well, making her unable to pay the child support that the court will certainly order. She may then be required to defend herself in the legal system against resultant charges of intentionally failing to pay child support that are aggressively pursued by the batterer. She may be unsuccessful in her legal defense efforts and face either time in prison or probation. In post-*Oakley* Wisconsin, this probation under may come with the restriction that she not have any more children or face being sent to prison. In the end, women who are victims of domestic violence often become the accused themselves. In this case, they potentially may be accused of non-payment of child support if they are forced to flee or loose their jobs. The *Oakley* decision adds to this already heavy burden the additional penalty of preventing her from having children with a new partner. This is yet another dark day for the rights of women.

Despite the more progressive views about domestic violence that we would like to believe our society has, myths and misperceptions about domestic violence persist, and often make it difficult for a battered woman to receive a fair hearing and fair decision from the family court. These decisions often denies a domestic violence victim custody of her children, imposes the original obligation to pay support, and frequently later the criminal court tries her for failing to meet her obligations. The misperceptions often are the basis for these women losing custody in the first place as many of the professionals involved in such cases may fail to recognize the abusive patterns of the batterer which can result in the woman losing custody of her children to the batterer.

The woman is often held equally accountable in the face of a high-conflict divorce and custody action with a batterer over which she has no control or ability to end. A batterer's obsession can destroy himself and his ex-spouse financially, first makes it difficult for her to fight for her children and, later, to pay child support when she loses custody. A poor or middle class woman may end up with no or little access to legal assistance in family court and even if she has some resources can be destroyed financially very quickly by either a wealthy batterer or simply one with limited resources that is obsessed and does not care about the result, financially or otherwise, for either party. Batterers often feel a need to control their victims through verbal abuse, threats, psychological manipulation, sexual coercion and financial restraints. The batterer will then deny responsibility for his actions and blame the victim for his own behavior.

Complicated custody evaluations under the best interest standards are a perfect forum for an obsessed batterer to destroy the victim and perpetrate abuse even after she has left him. A batterer will work hard to portray his image as a concerned "family man." Then, it is easy to point the finger at the victim, making it easy for the judicial system to minimize the role of the batterer in events involving the child. When the batterer manipulates the evaluatory process by using money to transfer power to the professionals involved and the woman complains about the services provided by professionals, she may suffer the retaliatory loss of her child. There are few checks on the system to protect against abuse of the family courts by batterers or stalkers with more resources than their victims. There are few checks on the professionals involved in the custodial evaluatory process at all. Protracted litigation requiring payments to attorneys, evaluators, and guardians ad litem can sometimes drag on for years, and will drain her of any financial resources she has. She still may still lose custody of her child and be ordered to pay support to the batterer, who has already made it difficult for her financially.

The batterer will then continue to impose pressures on her already drained economic resources to prevent her from meeting this new financial obligation. It is not unusual for a batterer to assert economic and resource abuse on the victim, which would include attempts to interfere with or prevent her employment.[38] Economic and resource abuse may be imposed in order to deny a woman's efforts to separate from the batterer, to punish her or retaliate for actions concerning children or other reasons.[39] A woman is left with the belief that she is now being stalked in family court by her batterer—and perhaps she is.

These myths and misconceptions about domestic abuse arise and are expressed in a myriad of ways, both blatant and subtle, and then after a woman loses custody of her child could cause judges to erroneously reject her defense for nonpayment of court ordered child support. It is imperative that consideration be given in the proceedings when they are brought by an ex-spouse who is vindictive and perhaps files inaccurate information with the court, particularly in light of the denial of battering and harassment that is

38. James Ptacek, *The Tactics and Strategies of Men Who Batter: Testimony from Women Seeking Restraining Orders*, *in* VIOLENCE BETWEEN INTIMATE PARTNERS 104, 110-11 (Albert Cardarello, ed. 1997).

39. *Ptacek*, *supra* note 38, at 112.

prevalent in the justice system, the community and families. It is not realistic to expect that the batterer or his relatives or friends—who are likely to be prosecution witnesses in such a case—to provide accurate information about the abuse inflicted by the batterer. Their testimony is likely to contain substantially inaccurate information based on a denial that the abuse existed or is continuing, which may be the underlying reason causing the woman to fall behind in the child support payments or perhaps preventing the woman from paying the child support at all because she cannot keep a job. And, to all of this we might add a court order by an unsympathetic judge to prevent her from having another child. This results in just one more way that the batterer can manipulate the victim and control her life.

FINAL THOUGHTS

So, what about Lucy and Sarah from earlier? Under the decision in *Oakley*, they both appear to be destined to be forced into unacceptable choices in their lives with respect to their partners and reproductive lives. Of course, the impact on women is surely not limited to these two scenarios. One might wonder as well, with Wisconsin's lead, how many other jurisdictions will take similar position with respect to reproductive rights. And, will these typically male-dominated panels of judges of the various states consider the potential impact on women? Not that I don't have any faith in our American system of justice, but I have my doubts about the consistency with which our courts protect the rights of women. When it comes to reproductive rights, our courts have an even spottier record with respect to women.

A number of obvious, easy alternatives to the methods handed down by the court in *Oakley* are evidence that the criminalizing the birth of children violates the Constitution. The dissent in *Oakley* stated readily available alternatives to the imposition of a probation condition that the individual not have another child. A state may order child support payments, take classes on financial responsibility or parenting, garnish wages and can criminally prosecute those who fail to pay.[40] The conduct of a parent who fails to pay child support might be irresponsible or might even be criminal, but extension of the punishment into the fundamental right to have children is wrong and will undoubtedly lead to erroneous and unjust

40. State v. Oakley, 629 N.W.2d 200, 220-22 (Bradley, J., dissenting, Sykes, J., dissenting).

results, often inflicted disproportionately on groups of persons. Women are likely to be one of those groups affected by the *Oakley* decision. As the precedent has now been set, all that is left is its further extension and application to the rights of others. "[W]e must keep in mind what is really at stake in this case[,] [t]he fundamental right to have children . . . ."[41]

41. *Id.* at 221 (Bradley, J., dissenting).