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Prisoners and Procreation: What Happened Between Goodwin and Gerber?

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TABLE OF CONTENTS

I. CONSTITUTIONAL ANALYSIS AND PRISONERS' RIGHTS
   A. Historical Analysis of the Court's Standard of Review Movement in Analyzing Prison Regulations and Policies for Constitutionality
   B. Specific Rights That Have Been Retained or Denied
   C. Penological Interests
II. DISTRICT AND CIRCUIT COURTS WEIGH IN ON THE ISSUES
   A. The Current Law Concerning Conjugal Visitation and Procreation in Prison
   B. An Overview of the Analysis in Goodwin
   C. An Overview of the Analysis in Gerber
III. THE SOCIAL SHIFT AND REPRODUCTIVE TECHNOLOGY
   A. Historical Perspective on the Family Unit and Procreation Rights
   B. Reproductive Technology
IV. THE SUPREME COURT TODAY AND A PREDICTION FOR TOMORROW
   A. The Supreme Court's Perspective on Inmate Marriages and Procreation: Should the Right to Procreate While in Prison Survive Incarceration?
   B. In the Unlikely Event the Supreme Court Finds That There Is a Fundamental Right to Procreate by Assisted Reproduction Technology While in Prison, Is Such a Right Legitimately Restricted by a Penological Interest?
   C. The True Unfairness in the Battle of the Sexes: A New Penological Interest
   D. The Dividing Line
V. POLICY CONSIDERATIONS, CONSEQUENCES, AND CONCLUSIONS
   A. Reproductive Technology and the Consequences of Granting This Right to Prisoners on the Stability of Society
   B. Mental and Physical Health Concerns
   C. Morally Repugnant
   D. Possible Solutions

"[A]llowing an inmate to 'create a kid who he's not going to be able to father—is that what prisons are for?'"[1] Historically, the courts have answered that question with a resounding "no."

Although the Supreme Court has ruled on several areas of prisoners' rights, it has yet to review an inmate's claim for the right to procreate while in prison.[2] In 1990, the Eighth Circuit held, in *Goodwin v. Turner*, that the right to procreate does not survive incarceration.[3] Recently, the Ninth Circuit, in *Gerber v. Hickman*, ruled that an inmate serving a life term sentence could artificially inseminate his wife while in prison.[4] This is the first court to fall on this side of the "prisoner's procreation right" debate.[5]

This comment examines what happened in the years between *Goodwin* and *Gerber* and how the current Supreme Court should come down on this controversial legal issue today. This comment will review the Supreme Court's framework for analyzing prisoners' constitutional claims in Part I. Part II outlines the lower courts' responses to inmates' requests for procreation rights, including an overview of the *Goodwin* and *Gerber*

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1. Bob Egelko, *Court OKs Remote Fatherhood for Inmates*, S.F. CHRON., Sept. 6, 2001, at A3 (quoting Deputy Attorney General Gregory Walston's response to the holding in *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001), *vacated, reh'g en banc granted*, 273 F.3d 843 (9th Cir. 2001)).

2. The Court has ruled on prisoners' rights in the areas of marriage, religion, discrimination, and unreasonable searches. *See* Turner v. Safley, 482 U.S. 78 (1987) (marriage); Cruz v. Beto, 405 U.S. 319 (1972) (religion); Lee v. Washington, 390 U.S. 33 (1968) (discrimination); Hudson v. Palmer, 468 U.S. 517 (1984) (searches).

3. Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990).

4. *See Gerber*, 264 F.3d at 884. The court limited its holding, however, to the issue of the right to procreate while incarcerated, and did not "conclude that a prisoner has a constitutional right 'to mail his semen from prison so that his wife can be artificially inseminated,'" as the dissent incorrectly stated. *Id.* at 888 n.6 (quoting *Id.* at 893 (Silverman, J., dissenting)).

5. Other courts beyond the Eighth Circuit in *Goodwin* that have addressed this issue have looked at the problem surrounding conjugal visitation and its relation to procreation. *See* Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) ("Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting."); *see also* Southerland v. Thigpen, 784 F.2d 713, 718 (5th Cir. 1986) (holding that the right to breast feed was outweighed by legitimate penological goals of the state); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) (stating that although prisoners have no absolute constitutional right to visitation, restrictions on that right must be "necessary to meet penological objectives"); Lynott v. Henderson, 610 F.2d 340, 342 (5th Cir. 1980) (holding that prison officials were justified in refusing to permit prisoners to visit certain married women); Bazzetta v. McGinnis, 902 F. Supp. 765, 769-70 (E.D. Mich. 1995) (stating that prisoners' right to association is not "absolute [or] unfettered" and that First Amendment rights are "necessarily curtailed by confinement"); Anderson v. Vasquez, 827 F. Supp. 617 (N.D. Cal. 1992) (holding that inmates condemned to death had no right to conjugal visits and that the prison had no obligation to provide artificial insemination services), *aff'd in part, rev'd in part*, 28 F.3d 104 (9th Cir. 1994) (unpublished opinion); Wool v. Hogan, 505 F. Supp. 928, 932 (D. Vt. 1981) (holding that, "because plaintiff is incarcerated[,] his right to marry, if he has one, does not include the rights of cohabitation, sexual intercourse, or procreation"); Percy v. N.J. Dep't of Corr., 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995) (holding that a prisoner serving a life sentence had no constitutional right to procreate by means of artificial insemination and that a restriction on artificial insemination was related to legitimate penological interests). Criticism in *Safley v. Turner* was limited to the prohibition on a prisoner's right to partake in a marriage ceremony. Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985).

opinions, which were based on the same analytical framework.[6] Part III examines the social shift in public perceptions about procreation and the term "family." The traditional notions of family life faded in the last thirty years of the nineteenth century and, ironically, society has urged science to assist it in the area of reproductive technology in the hopes of creating a family unit. In Part IV, this comment will analyze the current Supreme Court and the jurisprudential factors that might weigh into the Court's ruling if *Gerber* reaches the Court. Finally, Part V examines the legal, public, and moral repercussions of the decision to extend reproductive rights to prisoners.

I. CONSTITUTIONAL ANALYSIS AND PRISONERS' RIGHTS

A. Historical Analysis of the Court's Standard of Review Movement in Analyzing Prison Regulations and Policies for Constitutionality

The Supreme Court stated that the "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution"[7] and that "incarceration does not divest prisoners of all constitutional protections."[8] Historically, however, the Court has expressed three different perspectives on how to determine which rights survive incarceration. Until 1960, courts held the belief that prisoners practically lost all rights and that they were essentially slaves of the state.[9] Eventually, the courts recognized that prisoners do retain some constitutional rights, but such rights were under the authority and guidance of the legislative and administrative branches of the government.[10] This approach has commonly been referred to as the "hands off doctrine" and was premised on the concept that the courts lacked the

6. In both the *Goodwin* and *Gerber* opinions, the courts undertook the *Turner* analysis to decide if procreation was a right that survived incarceration. *See Goodwin*, 908 F.2d at 1395; *Gerber*, 264 F.3d at 882.

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

8. Shaw v. Murphy, 532 U.S. 223, 228 (2001).

9. Jack E. Call, *The Supreme Court and Prisoner's Rights*, FED. PROBATION, Mar. 1995, at 36, 36 (explaining that any rights a prisoner might have had were those rights which "the law in its benignity accords to them, but not the rights of free men"); *see also* Todd M. Turner, Note, *Constitutional Law - Prisoners' Rights - Prison Regulation Denying Inmate the Right to Artificially Inseminate Wife Held Constitutional:* Goodwin v. Turner, 13 U. ARK. LITTLE ROCK L.J. 671, 675 (1991) (explaining that prisoners were not afforded constitutional protections initially).

10. Call, *supra* note 9, at 36.

understanding, knowledge, and appreciation of the special nature of the penological system.[11]

Because of the changing political and social environment and attitude towards the prison setting, the era of the uninvolved judiciary came to an end in the 1960s.[12] Stories of the horrible treatment and conditions of prison confinement combined with the activist attitude of the time resulted in a new standard of review and perspective for the court system in relation to prisoners' grievances.[13] At this time, the concept of "strict scrutiny" emerged because, as the Court noted, a "policy of judicial restraint [with respect to problems of prison administration] cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution . . . [and] federal courts will discharge their duty to protect constitutional rights."[14] In an effort to establish a clear standard for prisoners' rights claims, the Court outlined the strict scrutiny test in *Procunier v. Martinez*.[15] Generally, a regulation is constitutional if it furthers an important or compelling state interest and the regulation's limitation is no greater than necessary or essential to protect that interest.[16] Thus, the requirement that the means be "necessary" indicates that there must not be any less restrictive way to achieve the government's interest.[17] This is a high standard to prove and, consequently, most regulations do not survive this test.[18] As one commentator noted, the strict scrutiny era marked a time that the Court not only recognized prisoners' retention of constitutional rights, but also "view[ed] those rights as being nearly as important as the legitimate needs of the prisons."[19]

In the late 1970s, the Court's opinions started to incorporate concepts of the "hands off" era again.[20] Specifically, in *Turner v. Safley*,[21] the Supreme Court rejected the strict scrutiny test in evaluating prison regulations because it hampered the daily need for safety decisions at the administrative level and, instead, the Court opted for a lower level of scrutiny.[22] In *Turner*, the

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11. *Id.*

12. *Id.* at 37.

13. *Id. See also* T. Joe Snodgrass, Note, *Constitutional Law - a Call for Strict Scrutiny: Eighth Circuit Denies Inmate's Request for Artificial Insemination* – Goodwin v. Turner, 17 WM. MITCHELL L. REV. 883, 889 (1991) (noting that "[o]ne commentator suggested that this retreat [from the hands off doctrine] was in response to the abhorrent prison conditions").

14. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974).

15. *See id.* at 413-14.

16. *Id.* at 413.

17. *See id.* at 413-14.

18. Snodgrass, *supra* note 13, at 893 (stating that "an inmate's success in challenging a prison regulation is conditioned upon application of the strict scrutiny standard of review").

19. Call, *supra* note 9, at 38.

20. *Id.* at 39.

21. Turner v. Safley, 482 U.S. 78 (1987).

22. *Id.* at 81-84.

Court established that if there is a "prison regulation [which] impinges on inmates' constitutional rights, [then] the regulation is valid if it is reasonably related to legitimate penological interest[s]."[23] In essence, where there is such a right, then we balance the right against the reasonableness of losing that right for the benefit of penological interests.

In determining the reasonableness of the restriction, the Court will look at a number of different factors. First, the Court will ask whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[24] This connection cannot be so tenuous such that the regulation is essentially "arbitrary or irrational."[25] Second, the Court will evaluate if there is an "alternative means of exercising the [asserted constitutional] right that remain[s] open to prison inmates."[26] Next, the Court will measure the impact "on guards and other inmates, and on the allocation of limited prison resources" if the asserted constitutional right is accommodated.[27] Finally, the Court will look for an alternative to the regulation and will evaluate if the regulation represents an "'exaggerated response' to prison concerns."[28] Essentially, if there is an available "alternative that fully accommodates the prisoner's rights at [a minimal cost] to valid penological interests," then the regulation in question is likely unreasonable.[29] According to *Turner*, a court should examine all of the above four factors in an evaluation of the regulation's relationship to a legitimate penological interest and look for a rational basis for the restriction.[30]

The "rational basis" concept was clarified and reinforced in *Thornburgh v. Abbott*, where the Court undertook an explanation of how prisoners' rights cases should be determined.[31] The Court cleared up the confusion created

23. *Id.* at 89.
24. *Id.*
25. *Id.*
26. *Id.* at 90.
27. *Id.*
28. *Id.*
29. *Id.* at 91.
30. The legitimacy, and the necessity, of considering the State's interests in prison safety and security are well established by our cases. In *Turner* . . . and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), we held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. Washington v. Harper, 494 U.S. 210, 223 (1990) (quoting *Turner*, 482 U.S. at 89) (citations omitted).
31. Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also* Snodgrass, *supra* note 13, at 895

by earlier cases concerning restrictions on constitutional rights which effect both a prisoner and a free citizen and clearly stated that the standard of review is the same rational basis test articulated in *Turner*.[32] The Court further explained that the only time that courts should apply the "strict scrutiny" standard is when the restriction involves outgoing correspondence.[33] *Thornburgh* also clarified that the neutrality component of the *Turner* reasonableness test is meant to ensure that the regulation in question "'further[s] an important or substantial governmental interest [which is] unrelated to the suppression of expression.'"[34] The Court has continued to clarify and solidify the importance of the *Turner* test and stated in a recent opinion that it "reject[s] an alteration of the *Turner* analysis that would entail additional federal-court oversight."[35] Thus, the proper analysis for determining the constitutionality of a regulation infringing on an inmate's fundamental right is currently the *Turner* reasonableness standard.

B. Specific Rights That Have Been Retained or Denied

Although the Supreme Court has not yet decided if the right to procreate while in prison survives incarceration,[36] the Court, using the above analysis, has opined specifically on a few areas in which prisoners have retained their rights as delineated in the Constitution. For example, inmates have the right to be free from racial discrimination.[37] The Court has also held that inmates have a right to "due process," including a reasonable right of access to the courts. [38] In the area of privacy,[39] the Court has decided that the right to

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(discussing the shift in constitutional claims analysis made by the Court).

32. *Thornburgh*, 490 U.S. at 415.

33. *Id.* at 412.

34. *Id.* at 415 (quoting Procuier v. Martinez, 416 U.S. 396, 413 (1974)).

35. Shaw v. Murphy, 532 U.S. 223, 230-31 (2001).

36. Gerber v. Hickman, 264 F.3d 882, 888 (9th Cir. 2001), *vacated, reh'g en banc granted*, 273 F.3d 843 (9th Cir. 2001).

37. Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (ruling that racial segregation in prisons is unconstitutional other than for a very specific security need).

38. *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (stating that prisoners "may not be deprived of life, liberty, or property without due process of law"); *see generally* Haines v. Kerner, 404 U.S. 519 (1972) (holding that an inmate must be allowed to present evidence in court regarding a complaint involving the internal operations of the prison); Johnson v. Avery, 393 U.S. 483, 485 (1969) (ruling that inmates could assist one another in preparing and filing petitions for subsequent court proceedings and habeas corpus relief and "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed").

39. Privacy in the context of the constitutional right of free citizens has been firmly established in many Supreme Court cases. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the fundamental right of privacy is implicit from the "penumbra" in the Fourteenth Amendment's Due Process Clause and that marriage is included in that right to privacy); *see also* Zablocki v. Redhail, 434 U.S. 374 (1978) (noting that marriage is of "fundamental importance" and "on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships"); Loving v. Virginia, 388 U.S. 1 (1967) (holding that marriage is a fundamental right

marry survives incarceration.[40] Prisoners must also be provided "reasonable opportunities" to exercise their religious freedom.[41] Finally, the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishments."[42]

Whereas prisoners are generally afforded the same fundamental rights prescribed in the Constitution as the general public, those rights are also more limited in scope than those for the rest of society because of specific penological objectives.[43] For example, the Court has been more restrictive in the area of First Amendment protections and has granted prisoners the right to only certain protections because of the various security concerns that arise in the First Amendment context.[44] In a Fourth Amendment context, the prisoner's right to be free from unreasonable searches does not exist in his or her prison cell because of the security interest of the prison administration.[45] Additionally, the Court has upheld state laws which limit an inmate's ability or right to vote, and it has held that felons can be deprived of voting rights if such laws are applied equally to all felons with the underlying interest of preserving the integrity of the privilege to vote.[46] Interestingly, all fifty states have withheld conjugal visitation rights for death row inmates.[47]

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and a liberty protected by the due process clause).

40. Turner v. Safley, 482 U.S. 78, 96 (1987) (holding that Missouri's restrictions on inmate marriages were unconstitutional).

41. *See generally* Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (holding that a Buddhist prisoner should be given equal opportunity to practice his faith as is granted to other prisoners similarly situated); Cooper v. Pate, 378 U.S. 546 (1964) (allowing prisoner to subscribe to religious publications).

42. U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) (stating that "deliberate indifference to serious medical needs of prisoners" is a violation of the Eighth Amendment).

43. Shaw v. Murphy, 532 U.S. 223, 227 (2001).

44. Pell v. Procunier, 417 U.S. 817, 822 (1974) (stating "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). Thus, media interviews with individual inmates are constitutional. *Id.* at 833-35. *But see Turner*, 482 U.S. at 93 (holding that restrictions on inmate-to-inmate written correspondence are constitutional); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 133 (1977) (ruling that a ban on the activities of a prisoner's labor union is constitutional).

45. Hudson v. Palmer, 468 U.S. 517 (1984).

46. Richardson v. Ramirez, 418 U.S. 24 (1974). Voting laws, which restrict pre-trial detainees from voting, are not constitutional. O'Brien v. Skinner, 414 U.S. 524 (1974); *see generally* Bell v. Wolfish 441 U.S. 520, 535 (1979) (noting that the proper inquiry in deciding the constitutionality of conditions imposed on a pre-trial detainee is whether the "conditions amount to punishment" because, "under the Due Process Clause, a detainee may not be punished prior to an adjudication").

47. Valerie Richardson, *14 on Death Row Are Just Dying to Become Daddies*, WASH. TIMES, Dec. 31, 1991, at A3. According to the California Code of Regulations, conjugal visitations or

C. *Penological Interests*

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[48] What are the various penological considerations that guide the courts in weighing the *Turner* factors? Traditionally, the courts have noted four underlying purposes associated with imprisonment: "(1) the protection of society [through incarceration], (2) the deterrence of crime . . . , (3) the possibility of rehabilitation, and (4) punishment or retribution for wrongdoing."[49] Occasionally, a court will assert the goal of "cost efficiency" as a rationale for restricting a prisoner's right.[50]

Such restrictions or retractions of a prisoner's right serve "as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction."[51] In *Gregg v. Georgia*, the Court noted that the death penalty serves three penological interests, including retribution, "deterrence of capital crimes by prospective offenders," and "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future."[52] Because of the importance of the various penological interests in our society, courts give prison officials deference regarding prison policies set to support the goals of imprisonment.[53]

"family rights" are considered a privilege and are granted only when there is a minimal security concern and a "bonafide and verified" family relationship. CAL. CODE REGS. tit. 15, § 3174 (2001).

48. Price v. Johnston, 334 U.S. 266, 285 (1948); *see also Jones*, 433 U.S. at 133; Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

49. State v. Baker, 38 P.3d 614, 615 (Idaho 2001) (citing State v. Zaitseva, 13 P.3d 338 (Idaho 2000)); *see also* State v. Brown, 825 P.2d 482, 490 (Idaho 1992); State v. Toohill, 650 P.2d 707, 710 (Idaho Ct. App. 1982).

50. Snodgrass, *supra* note 13, at 908-09, 909 n.188 (listing three cases where a right was limited based on the objective of keeping costs to a minimum).

51. Hudson v. Palmer, 468 U.S. 517, 524 (1984).

52. Gregg v. Georgia, 428 U.S. 153, 183 & n.28 (1976) (citing People v. Anderson, 493 P.2d 880, 896 (Cal. 1972)); Commonwealth v. O'Neal, 339 N.E.2d 676, 685-86 (Mass. 1975). "A life sentence without any possibility of parole serves the goals of incapacitation and retribution while avoiding the risk of executing innocent people." David S. Friedman, *The Supreme Court's Narrow Majority to Narrow the Death Penalty*, 28 HUM. RTS. 4, 5 (2001).

53. Kristin M. Davis, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right to Procreate*, 44 WASH. U. J. URB. & CONTEMP. L. 163, 171 (1993).

II. DISTRICT AND CIRCUIT COURTS WEIGH IN ON THE ISSUES

A. The Current Law Concerning Conjugal Visitation and Procreation in Prison

Most states either strictly prohibit conjugal visitation, or severely limit this contact while incarcerated, thereby naturally limiting the procreative abilities of most prisoners.[54] The rationale for denying conjugal visitation has been described as the penological interest in "preserving institutional order and discipline, maintaining security to protect against escape or unauthorized entry, and achieving prisoner rehabilitation."[55] Several states, including California, have prohibited conjugal visits for inmates serving life sentences without the chance of parole.[56] In New York, prisoners are considered civilly dead if they are sentenced for life and cannot be married or enter a marriage contract after they are incarcerated for life.[57] New York has also limited conjugal visitation for prisoners if they have AIDS because the state has a substantial interest in preventing the spread of communicable diseases.[58] Legislative history in California reveals that the purpose of the regulation regarding prohibited conjugal visitation for life-term inmates is to promote "institutional security or public protection."[59] The decision to limit such contact rights directly affects one's ability to procreate.[60] Thus, limiting contact rights indirectly supports the penological interest of deterrence and the state's interest in minimizing the financial burdens

54. Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoner's Grievances*, 39 GEO. WASH. L. REV. 175, 203 (1970).

55. Davis, *supra* note 53, at 171.

56. CAL. CODE REGS. tit. 15, § 3174(e)(2) (2001) (prohibiting family visits to inmates serving a life sentence without parole or a parole date set); *see also* N.Y. CIV. RIGHTS LAW § 79 (McKinney 2002) (stating that persons serving a life term sentence are deemed civilly dead and, thus, this statute indirectly states that lifetime inmates are incapable of having conjugal visits); R.I. GEN. LAWS § 15-5-1 (2001) (stating civilly dead inmates cannot be married); Dep't of Corr. v. Roseman, 390 So. 2d 394 (Fla. Dist. Ct. App. 1980) (suggesting that a rule that prisoners cannot marry if they are serving a sentence of twenty-five years or more before parole, are death row inmates, or are those who seek to marry within the system is not constitutionally invalid).

57. Miner v. N.Y. Dep't of Corr. Serv., 519 N.E.2d 301, 301-02 (N.Y. 1987).

58. Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987).

59. *Prisoners: Conjugal Visits: Hearing on S.B. 1382 Before the S. Comm. on Judiciary*, 1992 Leg., Regular Sess. (Cal. 1992).

60. *Hearing on A.B. 369 Before the Assemb. Comm. on Pub. Safety*, 2000 Leg., cmt. 1 (Cal. 2000) (stating that "serious effect[s] of inmate conjugal visits are the resulting pregnancies and childbirths").

associated with running conjugal visitation programs and any resulting medical or administrative costs.[61]

Hypothetically, if the courts were to allow conjugal visitation for all prisoners without limitation, then it is likely that the percentage of women prisoners who would become pregnant as a result would increase respectively. Most state correction systems require that a pregnant inmate eventually make one of two choices: to abort or carry the baby to term and then outplace the child with a relative or agency.[62] The court in *Pendergrass v. Toombs* held that a mother could not retain custody of her child while in prison because the right to rear her child was "incompatible with incarceration."[63] There is no place for a "family" in the prison setting.[64]

A preamble to a penal code statute in California reveals that there is a great number of female prisoners who are faced with family dilemmas either as pregnant prisoners or as parents of children left with other people outside the prison walls.[65] "Over one-half of the women in California prisons have minor children. As many as 6 percent of the women in jails and prisons are pregnant at any given time."[66] This reality has led to case law and legislation that attempt to prevent prisoners from increasing the size of their families while incarcerated.[67]

Most states have been proactive in establishing procedures and systems for caring for children conceived by prisoners. In Florida, a statute specifically states that "[t]he department shall provide for the care of any child so born and shall pay for the child's care until the child is suitably placed outside the prison system."[68]

Traditionally, courts within the Ninth Circuit have ruled that prisoners' rights are necessarily curtailed "in order to accommodate the innumerable 'institutional needs and objectives' of the prison."[69] In *Anderson v. Vasquez*, a district court case out of California prior to *Gerber*, the court specifically stated that there is no constitutional right to have an inmate's sperm preserved for insemination because such a right would be inconsistent with

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61. *Id.* (explaining that the undesirable result of conjugal visitation pregnancies is an increased cost to society in addition to the existing burden of housing a parent that should be punished).

62. FLA. STAT. ch. 944.24 (2002); Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 342 n.22 (3d Cir. 1987) (asserting that the cost of providing an abortion is less than the cost of carrying a child to full term).

63. Pendergrass v. Toombs, 546 P.2d 1103, 1103 (Or. Ct. App. 1976).

64. *Lanzaro*, 834 F.2d at 342 n.22.

65. CAL. PENAL CODE § 1174(a) (West 2001).

66. *Id.*

67. *Id.*

68. FLA. STAT. ch. 944.24 (2002).

69. Anderson v. Vasquez, 827 F. Supp. 617, 620 (N.D. Cal. 1992) (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).

"legitimate penological objectives."[70] Until *Gerber*, the Ninth Circuit was fairly consistent with its application of the *Turner* test and gave deference to the penological needs asserted by the state.

A majority of the courts that have faced similar questions regarding a prisoner's right to procreate have found that such a right, if it exists at all, is extremely limited. For instance, the *Hernandez v. Coughlin* opinion from the Second Circuit stated, "inmates possess the right to maintain their procreative abilities for later use once released from custody, even though this right is restricted."[71] Similarly, in the Fifth Circuit, in *Poe v. Gerstein*, the court stated that the taxpayers should not be responsible for guaranteeing a procreative opportunity, thereby expressing that the state's interest in being cost efficient in the allocation of resources is determinative in deciding such issues.[72] In Oregon, a court held that "[t]he exercise of certain constitutional rights is incompatible with incarceration" and that "[o]ne of those incompatible rights is the right to rear children."[73] A Wisconsin court rejected the notion of a prisoner's claimed right to procreate because of the very limited physical nature of incarceration.[74]

A New Jersey court held that a prison's policy against artificial insemination was valid and that the penological interests put forth by the state, including "[s]ecurity risks, scarce resources[,] and equal protection concerns," as well as potential economic concerns, were sufficient to give such deference to the prison officials.[75] Also, in the Fourth Circuit, in dictum, the court denied the right to marry and, indirectly, the right to procreate.[76] Finally, there are a few unpublished opinions stating that the right to procreate while incarcerated is questionable and likely not a constitutional guarantee.[77]

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70. *Id.* at 620-21 (relying on the analysis in *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988), *aff'd*, 908 F.2d 1395 (8th Cir. 1990), and *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)).

71. Hernandez v. Coughlin, 18 F.3d 133, 136-37 (2d Cir. 1994) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

72. *See* Poe v. Gerstein, 517 F.2d 787, 796 (5th Cir. 1975).

73. Pendergrass v. Toombs, 546 P.2d 1103, 1103 (Or. Ct. App. 1976).

74. State v. Oakley, 629 N.W.2d 200, 209 (Wis. 2001) (claiming that "incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint . . . [and] the right to procreate").

75. Percy v. N.J. Dep't of Corr., 651 A.2d 1044, 1047 (N.J. Super. Ct. App. Div. 1995) (holding that a male prisoner serving a life term could not artificially inseminate his wife from prison).

76. Holland v. Hutto, 450 F. Supp. 194 (W.D. Va. 1978), *aff'd*, 601 F.2d 580 (4th Cir. 1979).

77. *E.g.*, Vaughn v. Hvass, No. C4-99-2184, 2000 Minn. App. LEXIS 554, at *7 (Minn. Ct. App. June 6, 2000) (stating that "the right of procreation is inconsistent with [one's] status as a prisoner because conjugal visitation is not constitutionally guaranteed"); *see also* Anderson v. Vasquez, No. 92-16631, 1994 U.S. App. LEXIS 17200, at *6 (9th Cir. July 13, 1994) (pointing towards the fact

B. An Overview of the Analysis in Goodwin

Steven Goodwin was an inmate serving a fourteen-year sentence for drug offenses, and he desired to artificially inseminate his wife from prison in Missouri.[78] His wife was thirty years old at the time of trial and the couple feared that, at the date of his eventual release, she would be biologically beyond her ability to safely conceive.[79] The couple informed officials that they would bear all financial burdens associated with the extraction procedure.[80] The district court in *Goodwin* quoted the case of *Southerland v. Thigpen*, in which a female inmate could not breast feed her child,[81] stating "'the considerations that underlie our penal system justify the separation of prisoners from their spouses and children,'" and, thus, the court found that artificial insemination, like conjugal visitation, is outside the "reasonable contours" of an inmate's protected rights, and, thus, there was no need to engage in a *Turner* analysis.[82]

At the appellate court level, the court did not discuss whether or not the right to procreate survived incarceration and, instead, it engaged in an analysis regarding the reasonableness of limiting a prisoner's right to procreate in relation to any penological interest.[83] A basic tenet that courts hold in this type of analysis is that "incarceration necessarily deprives an individual of the freedom 'to be with family and friends and to form the other enduring attachments of normal life.'"[84] The majority opinion rationalized that the Bureau's prohibition on inmate procreation was rationally related to the interest of treating male and female inmates equally to the greatest extent possible.[85] Thus, if the prison treated male and female inmates similarly, there would be a significant impact on allocation of prison resources that are necessary and important for prison programs and security. This was the court's main rationale for holding that such a right, when balanced against the needs of the institution, was not necessary.[86]

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that the Supreme Court, "[i]n listing the 'attributes' of marriage which survive incarceration, . . . notably declined to mention the right to procreate").

78. Turner, *supra* note 9, at 671.

79. *Id.*

80. Goodwin v. Turner, 908 F.2d 1395, 1397 (8th Cir. 1990).

81. Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986).

82. Goodwin v. Turner, 702 F. Supp. 1452, 1455 (W.D. Mo. 1988) (quoting *Southerland*, 784 F.2d at 716), *aff'd*, 908 F.2d 1395 (8th Cir. 1990).

83. *Goodwin*, 908 F.2d at 1398.

84. *Id.* at 1399 (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).

85. *Id.* at 1400.

86. *Id.*

The court also addressed the lack of an alternative solution and stated that it "stem[med] from the fact that none [could] exist without compromising prison policy or expending a large amount of prison resources" for accommodation.[87] Additionally, it would have had a significant impact on other prisoners because of the impact on resource allocation if the court had allowed this right to stand.[88]

In his dissent, Judge McMillian noted that Goodwin's request was a minimal burden (clean container and a means to swiftly transport container to wife outside) compared to the importance of the fundamental right to procreate.[89] Judge McMillian stated that the majority incorrectly applied the *Turner* test and so he partook in his own *Turner* analysis and concluded that the right to procreate should survive incarceration.[90]

Under the first test of *Turner*, he claimed that the court should evaluate if the right to procreate survives incarceration.[91] Judge McMillian pointed out that the right to marry survives incarceration[92] because the court held that marriage and procreation are fundamental to the survival of the race and the stability and progress of our society are enhanced when they occur together.[93] Thus, he reasoned, the right to procreate should also survive incarceration.[94] He bolstered this argument with the concepts found in *Skinner v. Oklahoma*, a Supreme Court case regarding mandatory sterilization.[95] He argued that, in *Skinner*, sterilization was found to be unconstitutional and, thus, to avoid sterilization upon incarceration we must allow the right to procreate to survive imprisonment.[96] Finally, the dissent argued that, in *Monmouth County Correctional Institutional Inmates v. Lanzaro*,[97] the Third Circuit held that the right to elect abortion survives incarceration, thus, the choice to procreate while incarcerated remains intact.[98]

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87. *Id.*
88. *Id.*
89. *Id.* at 1401 (McMillian, J., dissenting).
90. *Id.* at 1407.
91. *Id.* at 1401.
92. Turner v. Safley, 482 U.S. 78, 78 (1987).
93. *Goodwin*, 908 F.2d at 1402.
94. *Id.*
95. *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
96. *Goodwin*, 908 F.2d at 1403 (claiming that "if the right [to procreate] did not survive incarceration, states would presumably be free to take away the capacity to procreate upon incarceration, which the Supreme Court found unconstitutional in *Skinner*").
97. 834 F.2d 326 (3d Cir. 1987).
98. *Goodwin*, 908 F.2d at 1403.

After satisfying the first test of *Turner*, Judge McMillian focused on step two—the reasonableness test—which includes an analysis of four factors to determine if a regulation is reasonable.[99] The first factor calls for a rational and valid connection between the contested regulation and "'the legitimate governmental interest put forward to justify it.'"[100] It is important that the underlying objective put forward is neutral and legitimate, and the regulation must be rationally related to that governmental objective.[101] The dissent recognized that the interest put forward by the state was that of treating the inmates equally; however, Judge McMillian argued that, even though this interest is neutral, it is not legitimate when it is "accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right."[102] He also claimed that the desire to treat inmates equally is irrationally connected to the refusal of this constitutional right.[103] Thus, the dissent concluded that the first prong of the second *Turner* test failed.[104]

Next, Judge McMillian looked to the second potential factor for upholding the restriction.[105] He concluded that the majority was correct in asserting that there are no alternative means of exercising that right which remains open to the prisoners.[106]

Next, Judge McMillian examined the impact of accommodation on others, such as the guards and inmates, and the impact on the allocation of resources generally, and he found that the majority incorrectly applied this third prong by examining the impact as if the right were available to all inmates.[107] The dissent suggested that accommodating the procreation right in this case did not necessarily mean it would be accommodated in another.[108] Thus, Judge McMillian concluded that any impact from accommodating Goodwin was *de minimis*, and the regulation did not survive the third prong of the *Turner* test.[109]

Finally, the dissent criticized the majority for neglecting to analyze the fourth *Turner* factor, which calls for an examination of the possibility of a

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99. *Id.*

100. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

101. *Id.* at 1404.

102. *Id.* at 1405.

103. *Id.* (asserting that "[p]risons are often required to accommodate the exercise of a particular right in some circumstances and, because of different security or administrative burdens, permitted to deny it in others").

104. *Id.*

105. *Id.* at 1405-06.

106. *Id.* at 1406.

107. *Id.* (limiting his discussion of whether the right survives incarceration to male inmates only because "[c]ourts have recognized that different treatment of male and female inmates does not necessarily offend equal protection").

108. *Id.*

109. *Id.*

"ready alternative."[110] A ready alternative would illustrate that the restriction on the constitutional right was unreasonable.[111] Judge McMillian asserted that there were at least two alternatives that existed to the challenged regulation and both accommodations allowed for a potential limitation on the procreative right to some.[112] Thus, he concluded, because three of the four *Turner* factors were inapplicable, this regulation was "an exaggerated response not reasonably related to legitimate penological interests."[113] This case provoked a strong dissent and stirred a motion for a rehearing en banc, but that request was denied.[114] Therefore, the proposition that the right to procreate does not survive incarceration, as explained in *Goodwin*, remains the law in the Eighth Circuit.

C. An Overview of the Analysis in Gerber

The facts in *Gerber* slightly differ from those in *Goodwin*. William Gerber was an inmate sentenced to life in prison and, thus, was denied conjugal visitation privileges with his forty-six-year-old wife.[115] Gerber was convicted of discharging firearms and making terrorist threats, and, because he had two prior convictions, his sentence was enhanced by eleven additional years.[116] The couple was also willing to bear the financial burden of an insemination procedure.[117]

The district court denied Gerber the ability to participate in the artificial insemination procedure based on the rationale as outlined in the circuit opinion in the *Goodwin* case.[118] When the case went on appeal to the circuit court, the majority reversed the district court after walking through the *Turner* analysis as laid out in the circuit dissent in *Goodwin*.[119] The majority

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110. *Id.* at 1407.

111. *Id.*

112. *Id.* (suggesting that the prison administration review each case individually for approval, or that the administration deny the right to any request which would unduly burden the prison security, administration, and allocation of resources).

113. *Id.*

114. *Id.* at 1395.

115. Gerber v. Hickman, 264 F.3d 882, 884 (9th Cir. 2001) (citing CAL. CODE REGS. tit. 15, § 3174(e)(2) (2002)), *vacated, reh'g en banc granted*, 273 F.3d 843 (9th Cir. 2001).

116. *Id.* at 884.

117. *Id.*

118. Gerber v. Hickman, 103 F. Supp. 2d 1214, 1216-18 (E.D. Cal. 2000), *rev'd, vacated, remanded* 264 F.3d 882 (9th Cir. 2001), *vacated, reh'g en banc granted,* 273 F.3d 843 (9th Cir. 2001).

119. *Gerber*, 264 F.3d at 882. Although this opinion has been vacated for the pending en banc hearing and opinion, this comment focuses on the analysis conducted in arriving at the court's

started with the proposition that the right to procreate is a fundamental right based on the precedent of *Skinner* and *Turner*.[120] Then, the court used only the first *Turner* factor to determine if the restriction on that right was reasonably related to a legitimate penological interest.[121]

The regulation did not reasonably relate to the three penological objectives asserted by the Warden because there was no valid, rational connection between these objectives and the restriction on Gerber's right.[122] One of the stated objectives of the corrections system—the policy of treating men and women prisoners the same—was rejected as a legitimate interest that was not implicated.[123] The court's reasoning was that male and female prisoners are treated the same insofar as they are "not similarly situated."[124] The next objective that the Warden sought to uphold was the security of others, and the court held that there were no safety risks in collecting Gerber's semen as indicated by the evidence on the record.[125] Finally, the Warden raised the issue of the cost of litigation related to the procedure or if others were denied the opportunity to participate also.[126] The court strongly insisted that it is "simply impermissible to restrict the constitutional rights of one group because of fear that another group will assert its constitutionally protected rights as well"[127] and that it is "generally reprehensible to suggest that restricting protected fundamental constitutional rights is justified by fear of increasing a party's liability."[128] Ultimately, the court rejected the argument that there was a valid connection between the three stated penological concerns and the restriction on Gerber's right.[129] Ironically, the same penological interest was advanced in *Gerber* that was advanced in

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original holding.

120. *Id.* The court based its reasoning on the rationale of *Skinner* and *Turner* taken together to conclude that the right to procreate survives incarceration. *Id.* at 889. *Skinner* preserved the right to procreate *following* incarceration and *Turner* stood as an example of how "right[s] related to marriage and family may be exercised in prison despite a prisoner's inability to carry out the 'typical' marriage while in prison." *Id.* These cases suggest that the right to procreate might be available to inmates. *Id.*

121. *Id.* at 882.

122. *Id.* at 890. The warden claimed that there were three penological reasons for restricting Gerber's right to procreate. *Id.* The three interests were: to observe the "policy of treating men and women prisoners the same, when possible; safety risks caused by prisoners collecting semen; and concerns about the cost of litigation relating to the procedure." *Id.*

123. *Id.* at 891.

124. *Id.* (stating that "[w]omen cannot avail themselves of the opportunity *Gerber* narrowly seeks—to provide a semen specimen to his mate so that she can be artificially inseminated").

125. *Id.* The warden was concerned that inmates could partake in gassing ("throwing their bodily fluids on others") or sending their semen in the mail to unsuspecting individuals. *Id.* The court stated that this is an issue for remand at the district court level, however, as the evidence stands, this does not seem to be a concern. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 891-92.

129. *Id.*

Goodwin, namely that there is a policy of treating male and female prisoners the same. However, each court came to a different conclusion on the validity of its relation to the restriction.

Like *Goodwin*, the dissent in *Gerber* was equally scathing. Judge Silverman gawked at the result of the opinion, which essentially granted "an inmate serving a life sentence . . . a *constitutional* right to mail his semen from prison."[130] The dissent argued that *Skinner* and *Turner* do not collectively suggest that the right to procreate is one that prisoners retain while in prison.[131] "Common sense also suggests that procreation is fundamentally inconsistent with incarceration."[132] Judge Silverman argued that the district court was correct and that the right to procreate is not available while in prison, and, thus, the *Turner* analysis was entirely unnecessary.[133]

III. THE SOCIAL SHIFT AND REPRODUCTIVE TECHNOLOGY

A. A Historical Perspective on the Family Unit and Procreation Rights

Since before America's founding as a nation, the traditional family unit resembled a property agreement whereby the man possessed both his wife and children.[134] "The marital status thus created was one that conferred virtually all legal rights upon the husband, who became the head of the newly established household."[135] The idea that a woman had equal rights to an identity and a voice did not come into question until the mid 1800s, when women started to reject the idea that they had no influence in where their families would live or to whom their property would pass upon their deaths.[136] Emerging social perspective and dogma of an era is usually reflected in the more controversial court opinions and state laws, and true legal change often takes years of debate and struggle.[137] It took seventy-two

130. *Id.* at 893 (Silverman, J., dissenting).
131. *Id.*
132. *Id.* at 894.
133. *Id.*
134. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2021 n.8 (2000); *see also* Judge Phyllis W. Beck, *The Metamorphosis of the Family*, 7 TEMP. POL. & CIV. RTS. L. REV. 251 (1998) (noting that children were considered property).
135. Kay, *supra* note 134, at 2021.
136. *Id.* at 2021-22 & nn.11-13.
137. *Id.* at 2091 ("Law typically follows, rather than leads, social change."). For example, "in the

years of social reform and debate before our government granted women the right to vote.[138] In the early stages of the twentieth century, prior to winning the right to vote, married women began to sense that they had more autonomy and individualism because of changes in divorce and property laws. However, the majority of women believed their primary responsibility was rearing their children and attending to the needs of the family.[139] With a new brand of equality, women and men began to slowly understand the concept of family structure with a new perspective, and, by the mid 1900s, women were not only working outside the home, but were also demanding equal pay and sharing child rearing responsibilities with the man.[140] Ironically, it was about this same time in history that women asked for the right to control their reproductive lives, and the 1960s ushered in a new host of social questions and family changes related to marriage and procreation.[141]

Until the last quarter of the twentieth century, there was essentially only one known way to reproduce biologically, and legal restrictions on reproduction historically have been limited to the context of heterosexual married couples.[142] Laws in several states previously limited intercourse to married individuals and, therefore, confined the question of procreation to that of the marital relationship.[143] However, in recent times, the Supreme Court and other state courts have been called upon to answer questions involving homosexual "unions," contraception, abortion, frozen embryos,

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1840s, state legislatures began to enact the Married Women's Property Acts designed to eliminate or modify the harsh common law doctrines affecting the legal status of married women" despite the popular opinion at the time. *Id.* at 2022. Another example is seen "during the early 1900s, [when] social reformers advocated eugenic sterilization as a solution to problems such as mental retardation. Thirty states enacted statutes authorizing compulsory eugenic sterilization. Eugenic sterilization theories have since been largely discredited and many states have repealed their statutes." *In re* Romero, 790 P.2d 819, 821 (Colo. 1990).

138. Kay, *supra* note 134, at 2024; *see also* U.S. CONST. amend. XIX (stating that the right to vote "shall not be denied . . . on the account of sex").

139. Kay, *supra* note 134, at 2032-33. It was around this time that the common law marriage scheme began to dissolve because the underlying rationale—that early pioneers did not have access to ministers who could officiate a formal ceremony—was a dying reality and socially undesirable. *Id.* at 2037.

140. *Id.* at 2040-48 (noting that women constituted 57% of the workforce in 1945, that in 1963 Congress passed the Equal Pay Act, and that the divorce rate increased almost 20% in the first fifty years of the twentieth century).

141. *Id.* at 2048 (explaining that "[t]he period of the 1960s was one of extraordinary social and political ferment in the United States" and citing the approval of the first birth control pill as an example of the type of social change).

142. Monique Vinet Imbert, *The Golden Egg: In Vitro Fertilization Produces Adjudication*, 17 RUTGERS COMPUTER & TECH. L.J. 495, 496-97 (1991) (citing the birth of the first test tube baby, Louise Brown, in 1978 as the first successful alternative means of reproduction).

143. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 9 VA. L. REV. 405, 406 n.5 (1983) (citing the laws in Massachusetts and New York, which prohibit fornication and label it as a criminal offense or misdemeanor).

and sterilization.[144] The issues specifically surrounding the procreative right continue to be complicated and socially delicate. As the technology in this area continues to evolve, and the American attitude towards privacy and independence grows deeper, the courts will eventually have to answer the tougher social and policy issues related to such bioethical questions.[145]

B. Reproductive Technology

It was not until the late 1970s that the American legal community began to examine the complexities involved with the quickly evolving scientific advances in reproductive technologies.[146] Today, we face questions not only about inmates seeking reproductive rights, but also free citizens who wish to clone themselves or their spouses.[147] The area of assisted reproductive technology generally covers reproduction by in vitro fertilization (IVF), artificial insemination, surrogacy, and cloning.[148] An *Assisted Reproductive*

144. *See* Roe v. Wade, 410 U.S. 113 (1973) (overturning a Texas criminal abortion law declaring it unconstitutional); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding a state law forbidding contraceptive use unconstitutional); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding a state Mandatory Sterilization of Inmates Act unconstitutional); Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a state sterilization law stating that "[t]hree generations of imbeciles are enough"); Baehr v. Mike, 994 P.2d 566 (Haw. 1999) (dismissing a lower court appeal because of a 1998 state constitution amendment adopted by the voters, which essentially created a reciprocal beneficiary status for homosexual couples); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (awarding the ex-husband the right to decline further use of the frozen embryos after his divorce).

145. *See also* Judith F. Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation Avoidance Approaches*, 29 J.L. MED. & ETHICS 197, 197 (2001) (noting that it is not surprising that courts are becoming arbiters of reproductive disputes in a society where there are over 100,000 frozen embryos in storage in the United States and that the divorce rate is close to 40-50%). *See generally* Kay, *supra* note 134, at 2092 (stating that "[a]s a nation we have placed great value on independence and privacy").

146. The first legal publications reviewing the topic of reproductive technologies were published in the late 1970s and early 1980s. *See* Paul J. Dostart, *Taxation of Embryo Transplants: The Land of Milk and Money*, 36 TAX LAW. 61 (1982); Kelly L. Frey, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 322 (1982); Laurelle H. Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B.J. 514 (1977); Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981); Robertson, *supra* note 143.

147. "Over the past decades, we have observed the law constantly playing catch-up to science in the areas of computer technology, digital music, electronic communications, stem cell research, [and] human cloning." Glendora Hughes, *Genetically Incorrect*, 35 MD. B.J. 34, 34 (2002). *See generally* Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 Harv. J.L. & Tech. 643 (1998) (outlining the history of human cloning and related laws).

148. *See* 1999 Annual Report Definitions for the CDC's Division of Reproductive Health, *at* http://www.cdc.gov/nccdphp/drh/ART99/appixb.htm. The Center for Disease Control defines assisted reproductive technology (ART) as: "All treatments or procedures that involve surgically removing eggs from a woman's ovaries and combining the eggs with sperm to help a woman become pregnant. The types of ART are in vitro fertilization, gamete intrafallopian transfer, and

Technology Report released in January 2002 reported that in 1999, approximately 30,200 infants were born as a result of this type of technology compared to 28,000 infants in 1998.[149] Due to the increasing rates in assisted reproduction births, it is important that our nation re-examine the public policy and consequences of this technology not only for our society as a whole, but also because of the implications on the prison population.[150]

IV. THE SUPREME COURT TODAY AND A PREDICTION FOR TOMORROW

A. The Supreme Court's Perspective on Inmate Marriages and Procreation: Should the Right to Procreate While in Prison Survive Incarceration?

The Supreme Court has created a clear body of law surrounding a free citizen's right to marry and procreate based on the concept of the right to privacy in fundamental matters, which is essentially the right to make decisions about highly private matters.[151] Specifically, the Court has stated that marriage is of "fundamental importance" and on the same level of importance as "decisions relating to procreation, childbirth, child rearing, and family relationships."[152] However, in making that sweeping statement, the Court put parameters around its concept of marriage and child rearing by stating, "a decision to marry and raise the child in a *traditional family setting* must receive equivalent protection and, if [the] right to procreate means anything at all, it must imply some right to enter the only relationship in which the [s]tate . . . allows sexual relations legally to take place."[153] It was in 1987, under the *Turner* opinion, that the Court validated a prisoner's limited right to marry and stated that the "right to marry, like many other

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zygote intrafallopian transfer." *Id.* *See also Cloning of Human Embryo Sparks Debate,* *BIOVENTURE VIEW*, Nov. 27, 2000, at 1 (noting that a privately held medical group has "created the first cloned human embryo").

149. *See* CDC's 1999 Annual Reproductive Health Survey, *at* http://www.cdc.gov/nccdphp/drh/ART99/99nation.htm.

150. One judge referred to the changing dynamics of the American family as creating a "fluidity and fragility in the picture," which "raises problems for the children of today." Beck, *supra* note 134, at 252. Children in today's families "cannot be certain the same adults will sustain them psychologically or economically as they grow. They cannot be certain that both a female and male will be available to them. They cannot be certain that they will lead geographically stable lives . . . [generally they] face greater uncertainty." *Id.* The uncertainty that Judge Beck discussed does not necessarily involve the children of inmates, but one can imagine that the impact on those children will be equally as difficult, if not more confusing.

151. *E.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973) (outlining the concept of the right to privacy and its implication on fundamental rights). "[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right [in various amendments and the Bill of Rights]." *Id.*

152. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

153. *Id.* (emphasis added).

rights, is subject to substantial restrictions as a result of incarceration."[154] The majority opinion in *Turner* was written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Stevens[155] and Scalia—four of the current justices[156]—which suggests that today's Court would still hold that prisoners' marriages are limited by the mere fact of incarceration.

One such limitation that the Court is likely to uphold is the limit on conjugal visitations, based on its language in *Turner*[157] and the denial of certiorari in several cases that specifically addressed appeals from prisoners claiming that the denial of the right to have conjugal visits is a constitutional violation.[158] The Court has stated explicitly that "most inmates eventually will be released . . . and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated," thus indicating that it is not concerned with an inmate's right to consummate a marriage while in prison.[159] The Court was not hesitant to specify the limits of a prisoner's right to privacy matters in the context of marriage, and, in listing the "incidents of marriage" that are unaffected by incarceration, the Court specifically omitted the right to participate in conjugal visits or to procreate while in prison.[160]

Skinner is the only case that the Court has adjudicated which specifically concerned prisoners and procreation.[161] *Skinner* involved prisoner sterilization, which was a negative policy affecting the post-incarceration rights of an inmate.[162] Ultimately, the Court held that a prisoner has a fundamental right to procreate *following* incarceration, thus

154. Turner v. Saffley, 482 U.S. 78, 94 (1987).

155. Stevens dissented in part because he disagreed with the manner in which the majority analyzed the two different regulations at issue in this suit and claimed that the majority should not have used such an "open-ended 'reasonableness' standard." *Id.* at 101 (Stevens, J., dissenting).

156. *Id.* at 80.

157. *Id.* at 96 ("Most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated.").

158. Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) (holding that the "right to marital privacy and conjugal visits while incarcerated is not" constitutionally protected); *see also* Block v. Rutherford, 468 U.S. 576, 586 (1984) ("That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion."); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986) (holding prisoners have no right to contact visits); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) (stating prison inmates have "no absolute constitutional right" to conjugal visits).

159. *Turner*, 482 U.S. at 96.

160. *Id.*

161. Skinner v. Oklahoma, 316 U.S. 535 (1942).

162. *Id. at* 536-37.

his ability to do so may not be destroyed.[163] The result of this opinion has been construed in two different ways by two different circuit courts.[164] One side stated that *Skinner* implies that procreation during prison is a protected right, and the other side argued that this holding only protects the ability to procreate post-incarceration.[165] If the Court intended that the *Skinner* holding extend only to the protection of the right "post-incarceration," then the impact would be very different for prisoners sentenced to life in prison because there is no post-incarceration period for these prisoners.

In a summary affirmance, the Court affirmed the judgment of a lower court that stood for the proposition that inmates serving life sentences were prohibited from marrying.[166] Thus, if a court subscribes to the belief that *Skinner* reserved the right to procreate during incarceration, it binds life term prisoners, who have no conjugal visitation or martial rights, to procreating specifically via assisted reproductive technology.[167] However, it is illogical to assume that, because an inmate has a privacy interest in marriage or a preserved right to procreate, the government should affirmatively assist in achieving reproduction. One goes too far to say that the government has "an affirmative duty . . . to provide facilities for conjugal visits or the means to assist in artificial insemination," especially for an activity that does not subject the prisoner to a "'fate forbidden by the principle of civilized treatment guaranteed'" by the Constitution.[168]

The Court has held that prisoners have a limited right to marry, which does not include the normal privileges associated with marriage, and the right to procreate has only been extended specifically to prisoners upon their

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163. *Id.* at 536.

164. *Compare* Gerber v. Hickman, 264 F.3d 882, 888-89 (9th Cir. 2001), *vacated, reh'g en banc granted*, 273 F.3d 843 (9th Cir. 2001), *with* Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988), *aff'd*, 908 F.2d 1395 (8th Cir. 1990).

165. *Compare Gerber*, 264 F.3d at 888-89 (holding that the right to procreate survives incarceration), *with Goodwin*, 702 F. Supp. at 1454 (holding that a prohibition on procreation while incarcerated was reasonable).

166. Butler v. Wilson, 415 U.S. 953, 953 (1974), *aff'g* Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973).

167. *See, e.g.*, Wool v. Hogan, 505 F. Supp. 928 (D.C. Vt. 1981) (denying an inmate sentenced to ten years conjugal visitation rights and the right to marry the mother of his child). "But because plaintiff is incarcerated his right to marry, if he has one, does not include the rights of cohabitation, sexual intercourse, or procreation." *Id.* at 932. *See also* N.Y. CIV. RIGHTS LAW § 79a (McKinney 2002) (instructing that inmates are deemed "civilly dead" if they are sentenced to life).

168. *Goodwin*, 702 F. Supp. at 1454 (quoting Trop v. Dulles, 356 U.S. 86, 99 (1958)) (noting that the prison "neither is nor should be responsible for guaranteeing procreative opportunity"). The court in *Goodwin* supported this statement by citing *Bell v. Wolfish*, where the Supreme Court held that a "'[l]oss of freedom of choice and privacy are inherent incidents of confinement.'" *Id.* at 1454 (quoting Bell v. Wolfish, 441 U.S. 520, 537 (1979)). Additionally, the court relied on a Fifth Circuit opinion where the court denied an inmate mother the right to breastfeed her baby because "'the considerations that underlie our penal system justify the separation of prisoners from their spouses and children and necessitate the curtailment of many parental rights that otherwise would be protected.'" *Id.* at 1455 (quoting Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986)).

release. Thus, there is no fundamental right to procreate while incarcerated, particularly through affirmative measures such as artificial insemination.

B. In the Unlikely Event the Supreme Court Finds That There Is a Fundamental Right to Procreate by Assisted Reproduction Technology While in Prison, Is Such a Right Legitimately Restricted by a Penological Interest?

If the Supreme Court were to hold that the right to procreate via reproductive technology while imprisoned survives incarceration, then the next prong of the *Turner* test requires that there be a "valid, rational connection" between the regulation that restricts the fundamental right and a legitimate and neutral governmental interest.[169] The penological interests of security, deterrence/retribution, and resource conservation are frequently referenced as legitimate interests in establishing a regulation of a prisoner's right.[170] In assessing whether there are valid penological concerns to the prison system in regulating assisted reproduction in prison, it is important to explore some of the issues that would arise if artificial insemination procedures were allowed in the prison context.

First, allowing this procreative right would pose safety hazards. In *Thornburgh*, the Court noted that if there were any issue that "concerns the entry of materials into the prison," the prison authorities would have broad discretion in regulating the entry of such materials because of the inherent safety concerns.[171] If reproductive technology were used to achieve procreation in prison, then the prison would be faced with administering the transfer of empty receptacles or containers full of genetic material every time a prisoner sought to exercise his or her right to procreate. Additionally, an extraction of a female prisoner's egg requires a doctor and a surgical procedure, which automatically introduces more complex security concerns and costs.[172] Thus, the entry of this material increases security concerns related to whether or not the material is truly what it is supposed to be or if it is some other hazardous material.

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169. Turner v. Saffley, 482 U.S. 78, 89 (1987).

170. *See* discussion *supra* Part I.C.

171. Thornburgh v. Abbott, 490 U.S. 401, 416 (1989).

172. Dorothy E. Mitchell-Leef, *What Happens at Egg Retrieval?* (1996), *at* http://www.surrogacy.com/medres/article/eggretrv.html (explaining that a female must undergo a full course of "ovulation induction medications" and then is administered sedation, and then undergoes an operation to remove the egg from the vagina).

Additional concerns include prisoners' abuse of the opportunity to "share" their genetic material. A prisoner's ability to "gas" other inmates or guards, or to send sperm through the mail system to people who are not expecting or desiring a prisoner's genetic material will cause harm to others.[173]

Next, there is the concern about the allocation of scarce resources and that the right to procreate via reproductive technology would be a significant drain on those resources because of the increased costs of administering the right to all inmates who desire to exercise this supposed right.[174] The state prisons will incur higher costs for additional medical staff and administrators as well as the expenses associated with paying for indigent prisoners who seek to exercise the same rights, or potentially for establishing a program to eradicate health concerns raised by the spread of disease to an unborn child.[175] The overall increased costs of medical services for women alone would seem a burden that the prison system should not have to bear in light of the other social and penological interests involved.[176] "Providing resources and accommodations for procreation to some inmates would likely reduce the availability of other desirable programs for all inmates."[177]

There is also an alternative means of exercising the asserted constitutional right, which lends credibility to the fact that a regulation prohibiting artificial insemination in the prison setting is not an exaggerated response. Prisoners who desire to be parents have the option of adoption. Adoption is available both domestically and internationally, and the adoptive parents[178] receive tax credits for participating in an adoption procedure. [179]

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173. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1125 (1995) (noting that "inmates have thrown their feces or urine on correctional officers, an act known as 'gassing'").

174. *See* Judy Licht, *Frozen in Time: Storing of Embryos Boosts the Chances of Pregnancy—and Raises Ethical Questions*, WASH. POST, Nov. 26, 1991, at Z10 (explaining that the cost of extraction and implantation of one fresh embryo is $10,000).

175. Jacqueline B. DeOliveira, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 TOURO L. REV. 189, 205 (1988) (commenting on the concern of providing monetary support for spouses and children of indigent prisoners); *see also* Luigi Brandimarte, *Sperm Plus Egg Equals One "Boiled" Debate:* Kass v. Kass *and the Fate of the Frozen Pre-Zygotes*, 17 N.Y.L. SCH. J. HUM. RTS. 767, 767 (2000) (discussing the high costs associated with reproductive technologies). This comment is limited to discussing the potential repercussions of allowing reproductive technology in the prisons and is in no way a complete analysis on the realities of each prison's financial position or population.

176. Percy v. N.J. Dep't of Corr., 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div. 1995) (acknowledging that "[i]f female prisoners had the right to artificial insemination, the financial burdens and security concerns would be quite significant inside the prison"); Mitchell-Leef, *supra* note 172 (highlighting the process of female egg extraction).

177. *Percy*, 651 A.2d at 1046.

178. The number of single parent placements is slowly increasing, both in domestic and international adoption settings. National Adoption Information Clearinghouse, *Single Adoptive Parents, at* http://www.calib.com/naic/pubs/s_single.htm (quoting W. Feigelman & A.R. Silverman,

Additionally, the free-citizen spouse could participate in assisted reproduction through commercial suppliers, thereby bypassing the internal security and cost concerns associated with the prisoner participation. The female spouse can purchase sperm from a sperm bank or, alternatively, a male spouse could enter a genetic surrogacy contract.

In addition to the security and resource concerns, the state prison also has a penological interest in assuring that there is some form of punishment, deterrence, or retribution.[180] That some fundamental rights are denied or limited is part of the punishment and to allow every prisoner the right to marry or procreate, either through conjugal visits or reproductive technologies, is not a deterrent for other potential criminals or repeat offenders, nor is it a form of retribution. These concerns should be balanced with the idea that inmates who will never be released from prison will never be able to fully participate in the joys of parenting or even knowing their children and, thus, may receive an even harsher form of retribution.[181] However, there is also some evidence that some prisoners simply seek the privilege of carrying on their genetic line or carrying a child to term.[182]

C. The True Unfairness in the Battle of the Sexes: A New Penological Interest

One of the penological objective arguments that the state prisons routinely advance is the requirement that inmates be treated equally to the extent possible.[183] When the Ninth Circuit assessed this penological concern, it dismissed it as an invalid concern because it narrowly construed the permission it was granting Gerber to mean that a male prisoner was seeking to send his semen to a woman outside the prison system and not seeking to accept such a sample himself.[184] The court analogized the equal

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Single Parent Adoption, in The Handbook for Single Adoptive Parents 123 (Chevy Chase, MD: National Council for Single Adoptive Parents ed., 1993)).

179. 2001 I.R.S. Publ'n 968, *Tax Benefits for Adoption,* 2001 WL 1035731 (2001). There may be societal policy concerns still associated with prisoners becoming parents while incarcerated. *See* discussion *infra* Part V.A (on the stability of society).

180. DeOliveira, *supra* note 175, at 202 (stating that "certain fundamental rights should be denied as part of the punishment itself").

181. *Id.* at 204 (noting that a prisoner may not be able to enjoy watching his or her child grow on a daily basis).

182. Avis Thomas-Lester, *Death Row Inmates Want to be Fathers; Prison Asked to Let Men Preserve Sperm*, WASH. POST, Aug. 18, 1991, at B1.

183. Gerber v. Hickman, 264 F.3d 882, 891 (9th Cir. 2001) (citing *Goodwin* as a comparison case), *vacated, reh'g en banc granted,* 273 F.3d 843 (9th Cir. 2001).

184. *Id.*

treatment argument in a footnote, stating that a woman prisoner seeking the same right would ask the prison to allow her to "donate an egg to her lesbian partner or to a surrogate mother."[185] Either way, female prisoners who become pregnant or who seek egg extraction for the purposes of donating such genetic material to another will inherently cost the state more financially because of the different security concerns and medical attention that such procedures require.[186] Thus, disallowing assisted reproductive techniques in the penological setting is for the purpose of ensuring equal accommodation to the female and male population of prisoners. This explanation seems rational in light of the alternatives and the disparate treatment among prisoners that would result if the restriction on procreation did not exist or were modified to allow prisoners to send out their genetic material. Additionally, if the courts allow procreation via artificial insemination, then female inmates who are pregnant and on death row can potentially stay their execution, thus, artificial insemination can affect their ability to stay alive longer than male inmates.[187]

There are possible alternatives to the current prison regulation that state prisoners cannot participate in reproductive technologies. One alternative is that all prisoners are allowed the opportunity to participate in procreative opportunities. Another option is that the right to procreate is limited to only those who are able to independently extract and send off genetic material. A final alternative is that those who are able to finance reproductive technologies on their own are given the freedom to do so. All of these alternatives either move valuable prison resources away from necessary prison programs, or create a disparate treatment between prisoners. In the

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185. *Id.* at 891 n.13.

186. *See* DeOliveira, *supra* note 175, at 209 ("Pregnant prisoners require additional medical care, modified facilities, and special diets."). Because there are additional procedures and practices involved in caring for, and attending to, women's procreation needs and there is a growing female population in the prison system, the end result of allowing females to participate in reproductive technology is a significant increase in costs. Jessica Y. Kim, *In-Prison Day Care: A Correctional Alternative for Women Offenders,* 7 CARDOZO WOMEN'S L.J. 221, 222 (2001) (noting that the number of women inmates increased 185% from 1980 to 1995). Also, in California, a government regulation established a Family Foundations Program:

> which is a 12-month residential substance abuse treatment program for pregnant and/or parenting female inmates who have been determined . . . to benefit from participation . . . . Female inmates in the program will be placed in a Family Foundations facility in the community as an alternative to serving their prison term in a State prison institution.

CAL. CODE REGS. tit. 15, § 3074.3 (2002). Male prisoners do not enjoy this same opportunity if they are expectant fathers.

187. Davis, *supra* note 53, at 190 n.179. *See* Ellen Goodman, *Prisoners of Love? Death Row Inmates' Demands to Procreate Were Inevitable*, CHI. TRIB., Jan. 12, 1992, at 4C (noting that if female death row inmates could remain pregnant, they could feasibly stay their execution until menopause); *see also* ARIZ. REV. STAT. § 13-4026 (2001); MISS. CODE ANN. § 99-19-57(1) (2001); OHIO REV. CODE ANN. § 2949.31 (West 2002).

end, the best result for ensuring that penological interests are preserved is to prohibit all inmates from partaking in assisted reproductive technologies.

D. The Dividing Line

The fundamental right to procreate, which is guaranteed to free citizens, should not be guaranteed to prisoners while incarcerated, especially when it requires the assistance of reproductive technology. If the courts choose to extend this right to prisoners while they are incarcerated, then the collective burden on the prison resources, and increased security and administration, should be a sufficient rationale for restricting that right. A dividing line should at least be drawn at prohibiting prisoners with life term sentences from procreating based on the concepts of "civil death," retribution, deterrence, and as a compromise to observing the penological interests of fairness to all prisoners.

V. POLICY CONSIDERATIONS, CONSEQUENCES, AND CONCLUSIONS

A. Reproductive Technology and the Consequences of Granting This Right to Prisoners on the Stability of Society

Because of the unique needs of the penitentiary system, the problems and questions that arise from reproductive technology will vary from the way in which we answer the same questions for free citizens. The questions raised by *Goodwin* and *Gerber*, such as what is the impact on prisoners who seek similar treatment; what are the safety concerns involved in the procedure; and what is the government's responsibility—financial or otherwise—to those who cannot afford to partake in these procreation techniques, remain unresolved by the circuit courts. Other questions such as, who is the parent if a male prisoner sends his sperm to a couple outside the prison walls; what are the custody rights involved; and if such a procreative right is denied, then what are the implications of the inability to procreate on a person seeking to procure a divorce from an inmate, are yet to be addressed.

Another area of concern in granting this right to prisoners is the automatic creation of a single parent household. Although there is no law against creating a single parent home, and it occurs regularly among free

citizens,[188] many reports have addressed the undesirable impact on society and on children in these situations.[189] A committee created by the Attorney General under President Regan submitted a report that stated:

> "Intact families are good. Families who choose to have children are making a desirable decision. Mothers and fathers who then decide to spend a good deal of time raising those children themselves rather than leaving it to others are demonstrably doing a good thing for those children. . . . Public policy and the culture in general must support and reaffirm these decisions—not undermine and be hostile to them or send a message that we are neutral."[190]

Thus, research groups and commentators have concluded that dual parent homes are in the better interest of our children and society and we should seriously reflect on this public policy consideration when determining the procreative rights of inmates.

When a prisoner leaves a family behind, the trend is that many families fall into deep financial hardship if they were not already in poor financial standing prior to the incarceration, and, thus, the family turns to state welfare programs for assistance.[191] Essentially, if we allow prisoners the opportunity to bring additional dependents into the world, then we are effectively increasing the burden on state resources to provide for these children all because one of their parents cannot, due to their own criminal decisions, provide for them. What type of stability is there in the family unit when the father or mother is in prison? Most children of inmates suffer greatly because of the lack of foundation and financial stability.[192] "Inmates'

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188. *See* 2000 United States Census Report, *at* http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf (illustrating that 28.3% (9.3% of 32.8% of families) of parents are raising their children alone); *see also* Karen S. Peterson, *Grandparents' Labor of Love*, USA TODAY, Aug. 6, 2001, at 1D (indicating that 42% of grandparents have primary responsibility for raising their grandkids).

189. "Fatherless children are at [a] dramatically greater risk of suicide." NATIONAL CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERV, SURVEY ON CHILD HEALTH (1993); *see also* Jean Beth Eshtain, *Family Matters: The Plight of America's Children*, CHRISTIAN CENTURY, July 1993, at 14, 14-21 ("Three out of four teenage suicides occur in households where a parent has been absent.").

190. Kay, *supra* note 134, at 2068-69 (quoting WHITE HOUSE WORKING GROUP ON THE FAMILY, THE FAMILY: PRESERVING AMERICA'S FUTURE 6 (1986)).

191. *See* Cheryl Wetzstein, *Welfare Reform Takes Money From Prisoners*, WASH. TIMES, Nov. 23, 1999, at A6 (reporting that approximately 40,000 prisoners were still receiving their welfare checks while in prison because they failed to terminate their benefits when they were convicted and welfare checks are typically sent to an inmate's house rather than to the prison). This article reveals that many prisoners come to jail already dependent on the state for basic support needs. *See also* John J. Donohue & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 5 (1998) (calculating the cost of incarceration and explaining the effect of the increased welfare dependency of families of inmates).

192. Justin Brooks & Kimberly Bahna, *"It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 271-72 (1994).

children are apt to experience behavioral problems due to lack of contact with one of their parents, which often translates into future criminal activity."[193] In all, it is not in the best interest of society or children to allow prisoners the opportunity to create more children through assisted reproductive technology because statistically those new children will suffer great emotional and financial hardship at a great cost to the state.

If we do allow prisoners to become parents, how do we treat visitation issues, and what is the impact of visitation on children?[194] In the case of a California prisoner like Gerber, there is no privilege of family visits because he is a life term prisoner.[195] Furthermore, in the case of prisoners who are serving shorter sentences, the factors weigh heavily against submitting children to such an unfriendly environment.[196] There are arguments in favor of visitation for the rehabilitative effect on prisoners.[197] However, society's primary concern should be for the innocent children and their health, well-being, and state of mind, and there is more concern that "exposing a young child to the truth about [their parent] might cause irreparable psychological and emotional harm . . . [and] visitation at a prison facility can be traumatic and detrimental to a child."[198] Why would we risk the harm?

B. Mental and Physical Health Concerns

Bringing children into the world from a prison setting also involves complicated physical and mental health concerns because inmates are more likely to contract a disease or illness that can be passed to the unborn child in utero.[199] One district court calculated that inmates have "'a 1 in 200 chance

193. *Id.* at 272. "[F]amilies often become increasingly unstable[] and economically dependent on the public assistance system." *Id.*

194. This discussion is limited to the realities of child visitation and the impact on the decision of allowing procreation in the first instance. For a more thorough analysis see Rachel Sims, *Can My Daddy Hug Me?: Deciding Whether Visiting Dad in a Prison Facility Is in the Best Interest of the Child*, 66 BROOK. L. REV. 933 (2001).

195. *See* CAL. CODE REGS. tit. 15, § 3174(e)(1-2) (2002) (prohibiting inmates who are convicted of a violent crime involving a minor or family member, or committing any sex offense, or sentenced to life or death, from participating in the privilege of family visits).

196. Sims, *supra* 194, at 947 (describing the atmosphere in most prisons as "unpleasant, depressing, and sometimes frightening").

197. *See Prisoners: Conjugal Visits: Hearing on S.B. 1382 Before the S. Comm. on Judiciary*, 1992 Leg., Regular Sess. (Cal. 1992) (statement in opposition) (claiming that "family visiting is an incentive for positive prison behavior").

198. Sims, *supra* note 194, at 948.

199. Sexually transmitted diseases are common diseases that are passed in utero, causing illness and complications, and they are also particularly prevalent in the prison population. *See* Silent Voices, *at* http://www.silentvoices.org/std.html (explaining that pregnant women with chlamydia,

of contracting HIV during each year of [their] prison stay.'"[200] The importance of keeping sexually transmitted diseases contained, as well as limiting the number of newborns who experience horrific illnesses because of their parents' infections, is a valid policy rationale for restricting reproductive rights of prisoners. In addition to suffering from sexually transmitted diseases, many prisoners are battling substance abuse problems. Babies born to mothers who struggle with addictions are extremely vulnerable to being born with the same addictions.[201] It is sad to consider the various physical maladies that prisoners' babies are susceptible to inheriting and the devastating impact such illnesses will have on a newborn's chance for a healthy life.[202]

Additionally, many prisoners suffer from some form of mental illness, which is not a strong factor in favor of allowing a prisoner to bring a child into the world, as many mental illness sufferers are deemed to be unfit parents.[203] Courts have found that where parents suffer from mental illness, they are deemed incompetent to raise a child.[204] These holdings suggest that in the case of prisons, where a high rate of mental illness is known, society should be concerned with the effects of granting this population unlimited procreation rights and opportunities.

C. Morally Repugnant

Several articles raise the prickly policy question of how to treat death row inmates who seek to carry on their genetic line despite their marital status and the crime for which they were committed to a death sentence.[205] One inmate was quoted saying, "'[i]t is my constitutional right to have children .... They have the legal right to kill me, but they have no right to

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gonorrhea, or syphilis cause blindness, pneumonia, arthritis, heart disease, and other illnesses, or even death, to their newborn babies); *see also* Ctr. for Aids Prevention Studies, Univ. of Cal., S.F., *What Is the Role of Prisons in HIV, Hepatitis, STD and TB Prevention?* (Aug. 2000), *at* http://www.caps.ucsf.edu/inmaterev.html. Sexually transmitted diseases in the prison setting include diseases such as syphilis, HIV, hepatitis, chlamydia, and gonorrhea. *Id.*

200. Hannah T.S. Long, *The "Inequality" of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 346 (quoting Myers v. Md. Div. of Corr., 782 F. Supp. 1095, 1096 (D. Md. 1992)).

201. CAL. PENAL CODE § 1174(l) (West 2001).

202. *Id.* § 1174(f).

203. Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, FED. PROBATION, June 2001, at 3, 4 (noting that a "recent survey revealed that nearly one in five U.S. prisoners report having a mental illness").

204. *In re* Frederick P., 779 A.2d 957 (Me. 2001) (holding that a mother had a serious mental health condition and terminating her parental rights).

205. Katherine Bishop, *Death-Row Inmates Want Sperm Stored for Artificial Insemination*, MONTREAL GAZETTE, Jan. 5, 1992, at E6 (noting lawsuits in California and Virginia by death-row inmates demanding the preservation of their sperm for artificial insemination); Thomas-Lester, *supra* note 182, at B1.

destroy my bloodline.'"[206] There are countless inmates who have brutally murdered innocent people or family members and now seek the opportunity to create a new family.[207] One inmate who was "convicted of killing his two children in a custody dispute with his wife" now joins as a plaintiff in a lawsuit asking the state to allow him to father another child. Isn't this the ultimate conceit, to expect the state to allow you the opportunity to create a new child after murdering your first child? Prisoners, particularly those condemned to death, who assert the right to procreate have raised eyebrows across the nation and have received little sympathy.[208]

D. Possible Solutions

The prison population is growing,[209] and the question surrounding this population's ability to procreate is of fundamental concern not only to the penological institutions and their objectives, but also to our society and its public policy foundations. The fundamental right granted to free citizens to procreate naturally or via reproductive technologies should not accompany a prisoner into the prison gates. Even if the Supreme Court concludes pursuant to *Turner's* first prong analysis that prisoners have a fundamental right to procreate, the Court should nevertheless give deference to the prison in determining the impact on penological interests. Specifically, affording this right to prisoners would cause too great of a strain to the penological interests of security, resource allocation for high priority programs, and the impact on true deterrence and retribution.

Additionally, in light of the great costs to society and the unborn children of prisoners, prison administrators should consider withdrawing conjugal visitation rights and any access to assisted reproduction techniques from all prisoners regardless of their sentence and gender. This restriction would have the same effect on all prisoners, except those sentenced to life, because, unlike prisoners who will serve their sentence and then return

206. Thomas-Lester, *supra* note 182, at B1 (quoting a death row inmate who claims he has a constitutional right to preserve his sperm).

207. Richardson, *supra* note 47, at A3; *see also* Goodman, *supra* note 186, at 4C (describing one plaintiff inmate as a man who "shot and killed an entire family" and another plaintiff as a man who "killed his 10 and 4 year old nephews, after they saw him rape and try to kill their mother—[his own] stepsister").

208. Goodman, *supra* note 187, at 4C (stating that such claims "ring[] a bit hollow"); *see also* Richardson, *supra* note 47, at A3 (noting that the Virginia Governor was "'appalled by [the plaintiff's] brazenness'").

209. See the U.S. Department of Justice, Bureau of Justice Statistics website at http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (graphing the growth in the prison population from 319,598 in 1980 to 1,312,354 in 2000).

home, life term prisoners will never resume a life outside the prison walls. It is essential that courts truly consider the difference between life term prisoners and other inmates sentenced for shorter durations and consider the interests involved in curtailing the former prisoners' rights. Courts have already allowed regulations which limit marriage for prisoners who are serving life sentences[210] and also limit conjugal or family visits.[211] The rationale in treating prisoners differently based on their sentencing stems from the fact that the prison population is inherently more dangerous and causes greater security concerns.[212] On a national level, the prison population increases.[213] The statistics report that over half of the increase in the prison population since 1990 is due to an increase in prisoners convicted of violent offenses and that the number of prisoners on death row has been increasing too.[214] Because this growing population of dangerous felons has existing restraints on its natural ability to procreate, courts will begin to face more claims for the right to artificially inseminate.[215] It is imperative that courts mandate a precedent now and tell all inmates that prison is not the place to start a family or to secure a genetic presence.

Rachel Michael Kirkley[216]

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210. Butler v. Wilson, 415 U.S. 953 (1974).

211. Anderson v. Vasquez, 827 F. Supp. 617 (N.D. Cal. 1992) (denial of conjugal visits to death row prisoners), *aff'd in part, rev'd in part*, No. 92-16631, 1994 U.S. App. LEXIS 17200 (9th Cir. July 13, 1994).

212. *Anderson*, 1994 U.S. App. LEXIS 17200, at *3 (stating that condemned prisoners "pose unique security problems").

213. See the U.S. Department of Justice, Bureau of Justice Statistics website at http://www.ojp.usdoj.gov/bjs/keytabs.htm.

214. *Id.*

215. Egelko, *supra* note 1, at A-20. "In California, the [Gerber] case would apply mainly to life prisoners—about one-sixth of the total of 159,000 inmates—because nearly all others are allowed conjugal visits under state regulations." *Id.* The number of prisoners under a sentence of death nationally in 2000 was 3,593. See the U.S. Department of Justice, Bureau of Justice Statistics website at http://www.ojp.usdoj.gov/bjs/keytabs.htm.

216. J.D. Candidate, 2003, Pepperdine University School of Law. The author would like to extend her gratitude to all of those who have provided her with helpful feedback and debate, especially Shira Franco, Blanca Young, and the author's wonderful husband JP Kirkley. Finally, she would also like to thank her family and friends for their encouragement through this writing process.