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# PROCREATION AND THE PRISONER: DOES THE RIGHT TO PROCREATE SURVIVE INCARCERATION AND DO LEGITIMATE PENOLOGICAL INTERESTS JUSTIFY RESTRICTIONS ON THE EXERCISE OF THE RIGHT

Richard Guidice Jr.\*

No “iron curtain” separates prisoners from the Constitution.<sup>1</sup>

## INTRODUCTION

Criminal conviction and lawful incarceration necessarily deprive citizens of many of the rights, privileges, and freedoms other citizens are afforded under the Constitution.<sup>2</sup> In the past, prisoners generally did not bring lawsuits alleging the deprivation of their constitutional rights,<sup>3</sup> because most courts held that prisoners forfeited their rights upon conviction.<sup>4</sup> Federal courts were reluctant to interfere with the internal administration of prisons,<sup>5</sup> and de-

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1. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

2. *E.g., id.* at 524 (stating that lawful imprisonment deprives citizens of freedom and other rights); *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (holding that conviction and sentencing deprive a person of the right to freedom from confinement); *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (holding that prisoners do not retain the full panoply of rights held by unincarcerated individuals).

3. Kristin M. Davis, Note, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right To Procreate*, 44 WASH. U. J. URB. & CONTEMP. L. 163, 163 (1993) (citing Barry R. Bell, Note, *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 163 (1986)) (federal courts were not willing to entertain prisoner rights suits until the early 1960s).

4. *Id.*

5. *See Sandin v. Conner*, 515 U.S. 472, 482 (1995) (“[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”); *Turner v. Safley*, 482 U.S. 78, 85 (1987) (stating that courts should exercise judicial restraint out of concern for separation of powers and state sover-

ferred to the expert judgment of prison officials.<sup>6</sup> Recently, however, the United States Supreme Court has recognized that an inmate retains those rights that are not inconsistent with his status as a prisoner or within the legitimate penological<sup>7</sup> objectives of the corrections system.<sup>8</sup> As a result, litigation surrounding prisoners' rights has grown dramatically over the past thirty years.<sup>9</sup>

One of the most hotly litigated prisoners' rights issues in federal and state courts is whether an inmate has the right to procreate through artificial means while incarcerated.<sup>10</sup> Previously, courts were reluctant to hold that prisoners have such a right.<sup>11</sup> No court

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eignty interests, because administration of prisoners is the responsibility of the legislative and executive branches); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (stating that courts should not assume that prison officials are insensitive to constitutional requirements or to the problems of achieving the goals of the penal system).

6. *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (stating that courts should defer to the expert judgment of prison authorities) (quoting *Wolfish*, 441 U.S. at 540-41); see also *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (stating that courts should give wide-ranging deference to decisions of prison officials); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (stating that courts should defer to prison administrators' decisions to adopt and implement policies needed to ensure order and security).

7. "Penological" refers to "the study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals." BLACK'S LAW DICTIONARY 476 (Pocket ed. 1996).

8. *Turner*, 482 U.S. at 95 (citing *Pell*, 417 U.S. at 822). Legitimate penological objectives include deterrence of crime, rehabilitation of prisoners, and institutional security. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). For a further discussion, see *infra* notes 110-122 and accompanying text.

9. Prisoner § 1983 substantive due process right's suits increased thirty-fold between 1966 and 1976 due to numerous victories in prisoners' rights cases. Davis, *supra* note 3, at 164 n.6 (citing Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 823).

10. *E.g.*, *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001) (alleging that a prison regulation unconstitutionally violated a prisoner's alleged fundamental right to procreate by way of artificial insemination); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) (alleging that a prison regulation unconstitutionally violated a prisoner's alleged fundamental right to procreate by way of artificial insemination); *Anderson v. Vasquez*, 827 F. Supp. 617 (N.D. Cal. 1992) (alleging that a prison regulation violated the Eighth Amendment by restricting prisoners' right to preserve sperm for artificial insemination); *Percy v. State Dep't of Corr.*, 651 A.2d 1044, 1047 (N.J. Super. Ct. App. Div. 1995) (alleging that a prison regulation unconstitutionally violated a prisoner's alleged fundamental right to procreate by way of artificial insemination); *State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001) (alleging that a condition of parole unconstitutionally violated a paroled prisoner's fundamental right to procreate).

11. See *Gerber v. Hickman*, 103 F. Supp. 2d 1214, 1218 (E.D. Cal. 2000) ("Whatever right plaintiff has to artificial insemination, it does not survive incarceration."), *rev'd* 264 F.3d 882 (9th Cir. 2001) (right to procreate survives incarceration); *Anderson*, 827 F. Supp. at 620 ("'fundamental right to procreate' . . . does not survive incarceration"), *aff'd in part, rev'd in part on other grounds*, 28 F.3d 104 (9th Cir. 1994) (unpublished mem. disposition) (issue of right to procreate in prison not ripe

had ever held that the right to procreate survives incarceration,<sup>12</sup> or that legitimate government interests did not justify a restriction on that right.<sup>13</sup> In 1990, the Eighth Circuit, assumed without deciding, that the right to procreate survives incarceration,<sup>14</sup> but held that a government-imposed restriction on a male prisoner's ability to exercise that right through artificial means was reasonably related to achieving legitimate penological objectives.<sup>15</sup> In 2001, however, the Ninth Circuit<sup>16</sup> became the first court in the nation to hold that the right to procreate does survive incarceration.<sup>17</sup> The court also held that no government interests offered justify a restriction on a male prisoner's ability to exercise the right by artificially inseminating<sup>18</sup> his civilian spouse.<sup>19</sup> This decision created a new split among federal circuit courts,<sup>20</sup> and this split is sure to spark litigation that will likely end up in the Supreme Court.

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for adjudication); *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (D. Mo. 1988) (prisoners' right to procreate is "fundamentally inconsistent with imprisonment itself"), *aff'd in part on other grounds*, 908 F.2d 1395 (8th Cir. 1990) (assuming, but not deciding, that the right to procreate survives incarceration and affirming on the basis that legitimate penological interests justified restriction of the right); *see also Percy*, 651 A.2d at 1047 (declining to hold that the right to procreate survives incarceration); *Oakley*, 629 N.W.2d at 203 (stating that imprisonment would eliminate a prisoner's right to procreate).

12. *See cases cited supra* note 11.

13. *Goodwin*, 908 F.2d at 1398 (assuming the right to procreate survives incarceration and ruling that legitimate penological interests justify a prison restriction on the exercise of that right); *Percy*, 651 A.2d at 1047 (ruling that even if the right to procreate survives incarceration, legitimate penological interests justify a prison restriction on the exercise of that right).

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

15. *Id.*

16. *Gerber v. Hickman*, 264 F.3d 882, 888, 890 (9th Cir. 2001), *rev'd en banc*, *Gerber v. Hickman*, No. 00-16494, 2002 U.S. App. LEXIS 9749, at \*1 (9th Cir. May 23, 2002), *aff'g*, *Gerber*, 103 F. Supp. 2d at 1214. The May 23, 2002, *en banc* decision by the Ninth Circuit, holding that the right to procreate does not survive incarceration and affirming the *Gerber* district court, was filed after completion of this Note. As a result, this Note makes no reference to the *en banc* decision and focuses on the now reversed decision in *Gerber*, 264 F.3d at 882.

17. *Gerber*, 264 F.3d at 888.

18. Artificial insemination is a noncoital process where semen is collected from a man under laboratory conditions and then inserted into a woman's body with a needleless hypodermic syringe at a favorable time in her ovulation cycle. *See* Kathryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 23 (1997).

19. *Gerber*, 264 F.3d at 892.

20. *Compare id.* at 890, 892 (holding the right to procreate survives incarceration and finding no legitimate penological interests to justify a restriction on prisoners' ability to exercise that right), *with Goodwin*, 908 F.2d at 1398 (declining to hold that the right to procreate survives incarceration and instead holding that legitimate penological interests justify a restriction on prisoners' ability to exercise that right).

A proper discussion of whether a prisoner retains the right to procreate while incarcerated necessarily requires an analysis of two separate and controversial issues. The first issue is "whether there is a fundamental right involved (in this case, the right to procreate) and whether that fundamental right is not 'inconsistent with [one's] status as a prisoner.'"<sup>21</sup> In other words, a court must initially determine that the right to procreate is a fundamental right and one that survives incarceration.<sup>22</sup> If the court finds that procreation is a fundamental right, the second issue is whether there are legitimate penological interests that justify a restriction on a prisoner's ability to exercise that fundamental right.<sup>23</sup>

Part I of this Note begins with a historical review of the fundamental right to procreate for nonprisoners. In order to provide a complete context to the procreation issue, a discussion of other fundamental rights that have been deemed to either survive or extinguish upon incarceration follows. Part I also outlines the standard of review for prison regulations that impinge upon a prisoner's fundamental rights. Part II considers whether the right to procreate should survive incarceration and examines the proper standard of review for determining whether a prison may justifiably restrict a prisoner's right to procreate. This analysis weighs an inmate's procreative rights against the penological objectives of the prison system and reviews how courts have attempted to do so. Part III argues that the right to procreate must survive incarceration, and that no valid connection exists between prison regulations and the furtherance of legitimate penological interests that would justify a total abrogation of a prisoner's right to procreate.<sup>24</sup>

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21. *Gerber*, 264 F.3d at 886 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

22. *See id.*

23. *Id.* at 886-87.

24. Prisoners' right to procreate through traditional means such as conception from direct sexual intercourse via conjugal visits has not been recognized as a constitutionally protected right. Therefore, this Note focuses on regulations that restrict the right to procreate via artificial means, including artificial insemination for males and in-vitro fertilization for females. *See, e.g., Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (holding that prisoners do not have a fundamental right to conjugal visitations). Also, because the circuit courts considering the issue have not drawn legal distinctions between the right to procreate while incarcerated for life-term prisoners and non-life-term prisoners, neither does this Note. *See, e.g., Gerber*, 264 F.3d at 882; *Goodwin*, 908 F.2d at 1395.

## I. BACKGROUND

Free-standing citizens enjoy the full range of rights afforded under the Constitution; prisoners do not.<sup>25</sup> Before discussing whether a prisoner has a right to procreate, this Part first reviews the right to procreate for nonprisoners. Following this review is an examination and analysis of the different rights that citizens retain and relinquish upon entering prison. Then, this Part presents the split between the Eighth and Ninth Circuits concerning a prisoner's right to procreate through artificial means. Lastly, this Part outlines the constitutional standards of review for prison regulations that impinge upon the fundamental rights of nonprisoners and prisoners.

### A. Origin of Procreative Rights for Nonprisoners

The Supreme Court has consistently recognized a fundamental right to procreate.<sup>26</sup> In 1942, the Court stated that certain legislation deprived individuals "of a right which is basic to the perpetuation of a race — the right to have offspring."<sup>27</sup> In cases involving family and marital rights outside the prison context, *Skinner v. Oklahoma* has been cited as standing for the proposition that procreation is a fundamental right, and that choices surrounding when and whether to have children are protected by the Constitution.<sup>28</sup>

Thirty years later, in *Stanley v. Illinois*,<sup>29</sup> the Court found that, "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man' and 'rights far more precious . . . than property rights.'"<sup>30</sup> Subsequently, the Court in *Carey v. Population Services International*, stated that, "It is clear that among the decisions that an individual may make without un-

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25. See *supra* note 3.

26. See, e.g., *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 851 (1992).

27. *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942). The legislation at issue in *Skinner* authorized the sterilization of persons convicted three times of a felony involving moral turpitude.

28. E.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Cleveland Bd. of Educ. v. Chesterfield Sch. Bd.*, 414 U.S. 632, 640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Gerber*, 264 F.3d at 889 n.7.

29. *Stanley*, 405 U.S. at 651-52. *Stanley* was a suit brought by a father whose children were taken away and made wards of the state when the children's unwed mother died, pursuant to Illinois law. *Id.* at 646. The claim was brought on equal protection grounds because, upon death of a child's unwed mother, unwed fathers were presumed to be unfit parents, whereas married fathers — whether divorced, widowed, or separated — and all mothers were presumed to be fit parents. *Id.* at 646-47.

30. *Id.* at 651.

justified government interference are personal decisions 'relating to . . . procreation.'"<sup>31</sup> The Court further declared, "The decision whether or not to beget or bear child is at the very heart of this cluster of constitutionally protected choices."<sup>32</sup> Although the Supreme Court has established that the right to procreate is of fundamental status,<sup>33</sup> it has yet to decide whether the right extends to the incarcerated.<sup>34</sup>

## B. Prisoner's Rights

### 1. *A Brief Early History of Prisoner's Rights in the United States*

At one time, convicted prisoners were considered slaves of the state.<sup>35</sup> Like slaves, the state afforded them no rights and no access to the courts.<sup>36</sup> In fact, during the 1800s, many states instituted a convict lease system, leasing many or all of their prisoners to the highest bidder for a fixed sum.<sup>37</sup> The government maintained no control over the management of the prisoners, and prisoners were treated exceptionally poorly.<sup>38</sup>

Towards the middle of the twentieth century, signs appeared that indicated the beginning of an advance in prisoners' rights.<sup>39</sup> Few substantive changes, however, were realized at that time<sup>40</sup> because

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31. *Carey*, 431 U.S. at 685.

32. *Id.*

33. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 851 (1992).

34. *Gerber v. Hickman*, 264 F.3d 882, 888 (9th Cir. 2001).

35. *E.g.*, *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (stating that a prisoner is "for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe."). "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added).

36. Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1229 (1998) (discussing recent measures taken by Congress and the Supreme Court to reduce the volume of prison litigation that has discouraged and discriminated against otherwise valid claims by prisoners).

37. See Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1463 (1997) (arguing that prisoners in contemporary chain gangs could establish a cause of action under the Eighth Amendment for cruel and unusual punishment).

38. *See id.*

39. See Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMP. L. 1, 9 (1998) (comparing the differences and similarities in the status of the prisoners' rights in the United States and Europe).

40. *Id.*

courts supported a policy of noninterference in prison affairs.<sup>41</sup> This policy, generally referred to as the hands-off doctrine,<sup>42</sup> made it almost impossible for inmates to get judicial relief.<sup>43</sup> Some inmates were kept in solitary confinement without clothes, hygienic materials, bedding, adequate food or heat, and the opportunity to clean either themselves or the cell. They were sometimes kept in such confinement for longer than twenty-four hours continuously.<sup>44</sup>

During the 1960s, federal courts began to depart from the hands-off doctrine.<sup>45</sup> Several factors provided the impetus for this change.<sup>46</sup> One factor was the Supreme Court's ruling that the Eighth Amendment<sup>47</sup> applied to the states by way of the Fourteenth Amendment.<sup>48</sup> In doing so, the Court provided prisoners with a foundation upon which to bring suits challenging the conditions in state prisons.<sup>49</sup> Another factor was the Court's decision that, under certain circumstances, actions could be commenced against state officials.<sup>50</sup> Consequently, the hands-off doctrine gradually eroded as courts became increasingly prisoner rights oriented.<sup>51</sup> The following subsection discusses some of the fundamental rights that courts have held to survive incarceration.

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41. See Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 Md. L. Rev. 149, 152 (1997) (discussing Justice Thurgood Marshall's prisoner rights jurisprudence).

42. *E.g.*, Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968) ("[T]he federal courts, including this one, entertain a natural reluctance to interfere with a prison's internal discipline . . ."); Gutterman, *supra* note 42 (citing Procnunier v. Martinez, 416 U.S. 396, 404 (1974)) ("[T]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration.").

43. Harding, *supra* note 39, at 9-11.

44. Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

45. See Harding, *supra* note 39, at 11.

46. *Id.*

47. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

48. Robinson v. California, 370 U.S. 660, 666-67 (1962).

49. Harding, *supra* note 39, at 11-12.

50. *Id.* at 12 (citing Monroe v. Pape, 365 U.S. 167, 187 (1961) (holding that 28 U.S.C. § 1983 permits individuals to seek a remedy in federal court for violations of federally guaranteed rights if the offender is acting under "color of law")).

51. *Id.*; *e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (holding that any use of a leather strap violates the Eighth Amendment); Estelle v. Ruiz, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982) (affirming in part and reversing in part the district court's holding that the Texas penal system's practice of overcrowding prisoners violated the Eighth Amendment); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (holding that Alabama's penal institutions violated the Eighth Amendment by creating a climate of violence in which inmates feared for their personal safety); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (affirming the district court's holding that Arkansas's peni-



## 2. *Other Rights Found to Survive Incarceration*

The Supreme Court has enumerated several guiding principles underlying its policy regarding prisoners' rights.<sup>52</sup> The Court has found that because "no 'iron curtain' separates" prisoners from the Constitution,<sup>53</sup> a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner."<sup>54</sup> In addition, the Court has emphatically held that prisoners do not forfeit all of their constitutional rights simply because of conviction and confinement in prison.<sup>55</sup> However, the Court has balanced these principles by also recognizing that incarceration necessarily limits many privileges and rights,<sup>56</sup> a constriction arising from both incarceration and valid penological objectives, "including deterrence of crime, rehabilitation of prisoners, and institutional security."<sup>57</sup> In applying these constitutional principles to cases implicating prisoners' rights, federal courts have recognized that some constitutional rights, other than the right to procreate, do survive incarceration.<sup>58</sup>

Regarding privacy rights of personal choice in family matters, including the right to procreate, the Supreme Court has held that inmates may not be sterilized while in prison. They have the constitutional right to maintain their procreative abilities for use when released from custody.<sup>59</sup> The Court has also held that a prisoner's right to marry survives incarceration.<sup>60</sup> The Court has further affirmed that the rights of free exercise of religion,<sup>61</sup> meaningful access to courts,<sup>62</sup> equal protection to be free of invidious racial discrimination,<sup>63</sup> and free speech<sup>64</sup> are all retained by inmates during imprisonment.

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tentiary system violated both the Eighth and Fourteenth Amendments because of an inmate guard system, extensive isolation, and the absence of meaningful rehabilitation).

52. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

53. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

54. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

55. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

56. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

57. *O'Lone*, 482 U.S. at 348.

58. *Gerber v. Hickman*, 264 F.3d 882, 887 (9th Cir. 2001).

59. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

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

61. *O'Lone*, 482 U.S. at 342 (affirming that the right to free exercise of religion is retained during incarceration).

62. *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977).

63. *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam) (prisoners retain the equal protection right to be free of invidious racial discrimination).

64. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

In *Skinner v. Oklahoma*, the state sought to enforce its Habitual Criminal Sterilization Act ("Act").<sup>65</sup> The Act authorized the sterilization of persons convicted of three felonies involving moral turpitude.<sup>66</sup> The Supreme Court struck down the Act, holding that prisoners have a constitutional right to retain their procreative abilities for use after release from prison.<sup>67</sup> The Court declared that, "Marriage and procreation are fundamental to the very existence and survival of the race."<sup>68</sup> The Court also expressed reservations about entrusting the state with the power to sterilize out of fear for the possible "far reaching and devastating effects."<sup>69</sup>

In *Turner v. Safley*,<sup>70</sup> inmates at a Missouri prison challenged a statewide regulation by the Missouri Division of Corrections permitting an inmate to marry only with the permission of the superintendent of the prison and providing that such approval should be given only "when there are compelling reasons to do so."<sup>71</sup> In holding that the right to marry survives incarceration,<sup>72</sup> the Supreme Court declared, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."<sup>73</sup> In support of its holding, the Court confirmed that the decision to

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65. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The *Skinner* Court did not hold that all sterilization was unconstitutional. Rather, the Court struck down the Act, permitting sterilization of criminals convicted three times for crimes "amounting to felonies involving moral turpitude," on equal protection grounds. *Id.* at 541. The Act allowed for sterilization of those who had thrice committed grand larceny, while those thrice convicted of embezzlement, a somewhat similar crime with similar punishment, were immune from punishment by sterilization. *Id.* Because the Court found the nature of the two crimes to be intrinsically the same and otherwise punishable in the same manner, it held that the Act unconstitutionally discriminated against persons convicted of grand larceny. *Id.*

66. *Id.* at 536.

67. *Id.*

68. *Id.* at 541.

69. *Id.*

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

71. *Id.* at 82-83. The class certified by the district court also included non-inmates "who desire to . . . marry inmates of Missouri correctional institutions and whose rights of . . . marriage have been or will be violated by employees of the Missouri Division of Corrections." *Id.* at 83. A second regulation, which placed restrictions on correspondence between inmates at different institutions, was also challenged in *Turner*. *Id.* at 81. The regulation allowed correspondence between inmates concerning legal matters without restriction. *Id.* All other correspondence was permitted only if "the classification/treatment team of each inmate deems it in the best interest of the parties involved." *Id.* For a further discussion of the correspondence regulation, see *infra* note 121 and accompanying text.

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

73. *Id.* at 84.

marry is a fundamental right for nonprisoners,<sup>74</sup> and an inmate “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>75</sup> Consequently, the Court found that although the right to marry is subject to limitations due to incarceration,<sup>76</sup> many important attributes of marriage still remain to form a constitutionally protected marital relationship in the prison context.<sup>77</sup>

In holding that prisoners have a constitutional right of access to the courts,<sup>78</sup> the Supreme Court, in *Bounds v. Smith*,<sup>79</sup> noted that the Court has consistently required states to shoulder affirmative obligations to assure that all prisoners have meaningful access to the courts.<sup>80</sup> Meaningful access requires the state to provide, at its own expense, a paper and pen to draft legal documents, notary services to authenticate them, and stamps to mail them.<sup>81</sup> Furthermore, the Court held that states must forego docket fees and expend funds for transcripts.<sup>82</sup> The Court went out of its way to support the notion that, although economic factors may be considered in choosing the methods used to provide meaningful access to the courts, “the cost of protecting a constitutional right cannot justify its total denial.”<sup>83</sup>

Federal circuit courts have followed the Supreme Court in extending certain fundamental rights of privacy to prisoners. In *Monmouth County Correctional Institute Inmates v. Lanzaro*,<sup>84</sup> for example, the Third Circuit held that the right to have an abortion survives incarceration.<sup>85</sup> The court recognized a woman’s fundamental right to terminate her pregnancy and found that the prison had no compelling reason to restrict her exercise of that right.<sup>86</sup> The court significantly cited *Turner* and *Skinner* to support both its

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74. *Id.* at 95 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Loving v. Virginia*, 388 U.S. 1 (1967)).

75. *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

76. *Id.*

77. *Id.* at 96.

78. *Bounds v. Smith*, 430 U.S. 817, 821 (1974).

79. *Id.* at 817.

80. *Id.* at 824.

81. *Id.* at 824-25.

82. *Id.* at 825.

83. *Id.*

84. *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

85. *Id.* at 333-34.

86. *Id.* (holding that the right to have an abortion survived incarceration; finding no legitimate penological interests to justify restrictions on that right and requiring the prison to provide access and funding to accommodate exercise of that right).

holding and the notion that important privacy rights survive incarceration.<sup>87</sup>

### 3. *Rights Found Not to Survive Incarceration*

Among the rights found to not survive incarceration are the right to marital privacy,<sup>88</sup> the right to association,<sup>89</sup> and the right to breastfeed one's child.<sup>90</sup> In *Hernandez v. Coughlin*,<sup>91</sup> involving a prisoner's right to marital privacy,<sup>92</sup> the Second Circuit held that "the Constitution . . . does not create any protected guarantee to conjugal visitation privileges while incarcerated."<sup>93</sup> The court concluded that even though an inmate's right to marriage is constitutionally protected, the right to marital privacy via conjugal visits does not survive incarceration.<sup>94</sup> The court based its holding on the reasoning that, "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting."<sup>95</sup> The court further noted that the consummation of marriage could take place after release from prison.<sup>96</sup>

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87. *Id.* at 334 n.11.

88. The right to marital privacy is often invoked in cases arising from the denial of conjugal visits to prisoners. *E.g.*, *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (holding that the right to marital privacy and conjugal visits while incarcerated is not constitutionally protected).

89. The right to association that is denied to prisoners is generally related to a narrower right to "contact visits," a term referring to nonsexual meetings between inmates with their immediate family and friends. *E.g.*, *Ramos v. Lamm*, 639 F.2d 559, 580 (10th Cir. 1980). The right to contact visits has not been held to survive incarceration. *E.g.*, *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (finding that prisoners have no absolute constitutional right to visitation); *Lynott v. Henderson*, 610 F.2d 340, 342 (5th Cir. 1980) (same); *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,"); *see also Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) ("numerous associational rights are necessarily curtailed by the realities of confinement"); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113 (9th Cir. 1986) (holding that denial of contact visits does not violate the Eighth Amendment); *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986) ("Loss of associational rights is thus inherent in the execution of a sentence of incarceration.").

90. *See Southerland*, 784 F.2d at 713 ("[T]he existence of a right [to breast feed] on the part of a convict duly sentenced to confinement is 'fundamentally inconsistent with imprisonment itself . . . .'").

91. *Hernandez*, 18 F.3d at 133.

92. *Id.* 136-37.

93. *Id.* at 137.

94. *Id.*

95. *Id.*

96. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 95-96 (1987)).

In *Toussaint v. McCarthy*,<sup>97</sup> the Ninth Circuit dismissed a prisoner's claim of a constitutional right to contact visitation, finding that the denial of contact visits does not violate the Eighth Amendment prohibition against cruel and unusual punishment.<sup>98</sup> The court cited security concerns relating to the potential smuggling into prison of contraband, particularly drugs.<sup>99</sup> The Fifth<sup>100</sup> and Sixth Circuits<sup>101</sup> have gone even further, each holding that prisoners have no absolute constitutional right to contact visitation.<sup>102</sup> Both circuits, in support of their rulings, have emphasized prison objectives such as rehabilitation, security, and maintaining order.<sup>103</sup>

As part of the spectrum of privacy rights relating to family relationships, procreation, and child rearing,<sup>104</sup> at least one circuit court has confronted an incarcerated mother's assertion that the right to breastfeed one's child survives imprisonment.<sup>105</sup> The Fifth Circuit, in *Southerland v. Thigpen*,<sup>106</sup> held that, "the existence of a right [to breastfeed] on the part of a convict duly sentenced to confinement is 'fundamentally inconsistent with imprisonment itself.'"<sup>107</sup> The court reasoned that the considerations underlying the 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."<sup>108</sup> Lastly, the court noted the added financial burden on the already heavily burdened prison system if such a right was to be realized.<sup>109</sup>

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97. *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986).

98. *Id.* at 1113-14.

99. *Id.* at 1114.

100. *Lynott v. Henderson*, 610 F.2d 340, 342 (5th Cir. 1980).

101. *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984).

102. *Id.* at 420 (holding that prisoners have no absolute constitutional right to contact visitation); *Lynott*, 610 F.2d at 342 (holding that prisoners have no absolute constitutional right to visitation). Although the Tenth Circuit has not yet held that prisoners have no absolute constitutional right to visitation, the court, in dicta, agreed with the "weight of present authority [that] clearly establishes that there is no constitutional right to contact visitation." *Ramos v. Lamm*, 639 F.2d 559, 580 n.26 (10th Cir. 1980).

103. *Bellamy*, 729 F.2d at 420; *Lynott*, 610 F.2d at 342.

104. *Southerland v. Thigpen*, 784 F.2d 713, 715-16 (5th Cir. 1986) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (quoting *Roe v. Wade*, 410 U.S. 113 (1973))).

105. *Id.* at 715.

106. *Id.* at 713.

107. *Id.* at 717.

108. *Id.* at 716.

109. *Id.* at 717.

### C. The Constitutional Standard of Review for Cases Involving Prisoners' Rights

#### 1. Turner: *Prison Regulations Impinging on the Rights of Only Prisoners*

In *Turner v. Safley*,<sup>110</sup> inmates brought suit to challenge two different prison regulations, one restricting inmate correspondence and the other restricting marriage.<sup>111</sup> The Supreme Court expressly articulated a "reasonable relationship" test, for evaluating "cases involving questions of 'prisoners' rights,'"<sup>112</sup> as opposed to cases also implicating the rights of unincarcerated third parties.<sup>113</sup> The Court held that a prison "regulation is valid if it is reasonably related to legitimate penological interests."<sup>114</sup> This test is deferential to prison administrators.<sup>115</sup> The Court identified four factors for determining the reasonableness of a regulation.<sup>116</sup> First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forth to justify it.<sup>117</sup> Second, the Court must consider whether there are alterna-

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110. 482 U.S. 78 (1987).

111. *Id.* at 81.

112. "We expressly reserved the question of the proper standard of review to apply in cases 'involving questions of "prisoners" rights.'" *Id.* at 85-86. "If [we] have not already resolved the question . . . we resolve it now." *Id.* at 89.

113. *Id.* at 89. The unanimous Court, nevertheless, carefully noted that a regulation prohibiting inmates from marrying civilians, as well as other inmates without the warden's approval, might be subject to constitutional review under the *Procunier v. Martinez*, 416 U.S. 396 (1974), heightened scrutiny standard, "because the regulation may entail a 'consequential restriction of the constitutional rights of those who are not prisoners.'" *Turner*, 482 U.S. at 97. However, the *Turner* Court chose not to apply *Martinez* because, "even under the reasonable relationship test, the marriage [regulation] does not withstand scrutiny." *Id.* Instead, the Court confronted the issue left unresolved in *Martinez*, namely the proper standard to apply to a prison regulation that impinges solely on an inmate's constitutional rights. *Id.* at 85-86, 89. The *Martinez* standard is discussed at length, *see infra* Part I.C.2., when third-party rights implicated by the denial of an inmate's right to procreate are considered.

114. *Turner*, 482 U.S. at 89.

115. The "reasonable relationship" standard espoused by the Court is an example of "deferential scrutiny," which is the easiest burden for the government to satisfy. *See* Jacqueline B. DeOliveira, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 *TOURO L. REV.* 189, 194-95 (1988) (arguing that denying prisoners the right to procreate via artificial means bears no rational relation to the furtherance of any legitimate penological objectives). A less burdensome "standard is necessary," the Court said, "if prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89.

116. *Turner*, 482 U.S. at 89.

117. *Id.* "Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbi-

tive means of exercising the right that remain open to prison inmates.<sup>118</sup> Third, what effect will accommodating “the asserted constitutional right [ ] have on guards and other inmates, and on the allocation of prison resources generally.”<sup>119</sup> Lastly, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”<sup>120</sup> Applying the test, the Court upheld the correspondence regulation,<sup>121</sup> but struck down the marriage provision.<sup>122</sup> This four-factor reasonable relationship test, articulated in

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trary or irrational. Moreover, the governmental objective must be a legitimate and neutral one.” *Id.* at 89-90.

118. *Id.* at 90. “Where ‘other avenues’ remain available for the exercise of the asserted right, courts should be particularly conscious of the ‘measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.’” *Id.*

119. *Id.*

In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison’s limited resources for preserving institutional order. When accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.

*Id.*

120. *Id.* “By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” However, the Court was careful to note that:

This is not a “least restrictive alternative” test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

*Id.* at 90-91.

121. *Id.* at 91. In concluding that the correspondence regulation was reasonably related to legitimate penological interests, the Court found: (1) the prohibition on inmate correspondence between institutions to be logically connected to legitimate security concerns; (2) the prohibition only barred communication with a limited class consisting of inmates at other institutions and did not deprive inmates of all means of expression; (3) inmate correspondence between institutions threatens the core functions of prison administration, including safety and internal security, and may have a potential ripple effect on more than one institution; and (4) a lack of obvious, easy alternatives to the restriction adopted by the prison that would impose no more than a *de minimis* burden. *Id.* at 91-93.

122. *Id.* at 91. In concluding that the marriage regulation was not reasonably related to legitimate penological interests, the Court found: (1) no logical connection between the marriage regulation and the prison’s concern for preventing “love triangles” between prisoners; (2) the regulation’s almost complete ban on marriage did not allow alternative means for inmates to marry; (3) no danger of a ripple effect on the security of fellow inmates and prison staff because the decision to marry is a completely private one; and (4) obvious, easy alternatives to the regulation, which was an exaggerated response to security objectives, at a *de minimis* burden to enforcing security objectives. *Id.* at 97-99.

*Turner*, is the current constitutional standard for reviewing whether a governmental regulation infringes upon the fundamental rights of a prisoner.

2. *Procunier v. Martinez: Prison Regulations Implicating the Constitutional Rights of Nonprisoners*

The *Turner* reasonable relationship test may not be appropriate in cases where a “[prison] regulation may entail a ‘consequential restriction on the [constitutional] rights of those who are not prisoners.’”<sup>123</sup> Instead, where the rights of nonprisoners are implicated, a more stringent standard of review is necessary.<sup>124</sup>

The Supreme Court’s task<sup>125</sup> in *Procunier v. Martinez*<sup>126</sup> was to formulate a standard of review for mail censorship regulations of inmates’ personal correspondence.<sup>127</sup> In attempting to do so, the Court was sensitive to both the policy of judicial restraint regarding issues of prison administration and the need to protect the constitutional rights of prisoners.<sup>128</sup> However, *Martinez* did not resolve the issue of the proper standard of review for prisoners’ constitutional claims.<sup>129</sup> Instead, the *Martinez* Court determined that the proper constitutional standard of review for regulations on correspondence between prisoners and members of the general public could be decided without resolving the “broad questions of ‘prisoners’ rights.’”<sup>130</sup> Therefore, the Court based its decision to strike down the correspondence restriction on the First Amendment rights of affected nonprisoners, stating, “[W]hatever the status of a prisoner’s claim to uncensored correspondence with an outsider, it is plain that the latter’s interest is grounded in the First Amendment’s guarantee of freedom of speech.”<sup>131</sup> Consequently, the

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123. *Id.* at 97.

124. *Id.* (suggesting, but not deciding, that the “heightened” scrutiny standard in *Martinez* may apply in cases implicating the constitutional rights of nonprisoners, thereby raising the burden which the government must meet to justify a regulation restricting those rights).

125. *Id.* at 85 (stating that the Court’s task in *Martinez* was to formulate a standard of review for prisoners’ constitutional claims).

126. *Procunier v. Martinez*, 416 U.S. 396 (1974).

127. *Id.* at 398-400.

128. *Id.* at 404-06.

129. *Turner*, 482 U.S. at 85.

130. *Id.* (quoting *Martinez*, 416 U.S. at 408).

131. *Martinez*, 416 U.S. at 408. Therefore, as the Court’s holding did not turn on the question of prisoners’ rights, the Court did not reach the question of whether a prisoner’s freedom of speech survives incarceration. *Id.* at 408-09. However, later in the same year, the Court did hold that prisoners’ right of free speech survives incarceration. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).



*Martinez* standard is relevant to the discussion of a prisoner's right to procreate because the denial of that right necessarily implicates the right to procreate of the prisoner's unincarcerated spouse.

The *Martinez* Court held that prison regulations which implicate the First Amendment liberties of free citizens must meet two important constitutional criteria to be enforceable.<sup>132</sup> First, a regulation is valid only if it "furthers an important or substantial governmental interest unrelated to the suppression of expression."<sup>133</sup> Second, the regulation must not be more restrictive than is "necessary or essential."<sup>134</sup> This test, which is more stringent than the *Turner* reasonable relationship standard, requires courts to apply heightened scrutiny<sup>135</sup> when reviewing prison regulations that implicate the liberties of nonprisoners.<sup>136</sup>

#### **D. *Goodwin, Gerber, and the Circuit Split Over a Prisoner's Right to Procreate***

##### **1. *Goodwin v. Turner: Assuming the Right to Procreate Survives Incarceration, Restrictions on Prisoners' Exercise of Their Right are Reasonably Related to Legitimate Penological Interests***

In 1990, the Eighth Circuit was faced with a case of first impression in *Goodwin v. Turner*.<sup>137</sup> The issue before the court was whether the right to procreate survived incarceration for prisoners.<sup>138</sup> Steven Goodwin, a federal prisoner in Missouri, sought to conceive a child with his wife through artificial means.<sup>139</sup> Goodwin and his thirty year old wife were concerned about delaying contraception until his release date due to the increased risk of birth defects as a result of increasing maternal age.<sup>140</sup> The Goodwins offered to bear all costs necessary to complete the procedure.<sup>141</sup>

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132. *Martinez*, 416 U.S. at 413.

133. *Id.* at 414.

134. *Id.* at 413.

135. See *Goodwin v. Turner*, 908 F.2d 1395, 1401 n.1 (8th Cir. 1990) (McMillian, J., dissenting) (referring to the "*Martinez* heightened scrutiny test"). Heightened or "intermediate" scrutiny mandates that, in order for a regulation to survive, it must bear a *substantial relationship* to an *important* governmental interest. See *Craig v. Boren*, 429 U.S. 190, 190, 197 (1976). *Turner*, on the other hand, merely requires that the regulation be *reasonably related to legitimate* penological interests, which is a less burdensome standard for the government to satisfy. See DeOliveira, *supra* note 115, at 194-95.

136. Davis, *supra* note 3, at 176-77.

137. *Goodwin*, 908 F.2d at 1396.

138. See *id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1398 n.5.

The Bureau of Prisons ("Bureau") refused to allow Goodwin to ejaculate into a clean container so his semen could be used to artificially inseminate his wife.<sup>142</sup> The district court rejected Goodwin's claim that the Bureau's denial of his request for permission to artificially inseminate his wife violated his alleged constitutional right to procreate.<sup>143</sup>

On appeal, the Eighth Circuit held that it need not consider whether the district court erred in holding that the fundamental right to procreate does not survive incarceration.<sup>144</sup> Rather, the court affirmed the district court's order on different grounds.<sup>145</sup> The court went only as far as to assume, without deciding, that the right to procreate survives incarceration.<sup>146</sup> Then, the court held that the prison restriction on the exercise of the right through artificial insemination was justified because it was reasonably related to furthering legitimate penological objectives.<sup>147</sup>

The court began its discussion of Goodwin's claim by rejecting his request that the court employ "strict scrutiny."<sup>148</sup> The court was not persuaded by the fact that the prison regulation restricting Goodwin's right to procreate also directly impacted his wife.<sup>149</sup> The court noted that, "Incarceration necessarily deprives an individual of the freedom 'to be with family and friends,'"<sup>150</sup> and refused to apply "strict scrutiny every time a family member is affected by the prison regulation."<sup>151</sup> Instead, the court used the test espoused in *Turner*.<sup>152</sup>

The court first found that the Bureau prohibition on prisoner procreation was rationally related to the Bureau's legitimate interest of treating all inmates equally, to the extent possible.<sup>153</sup> Next, the court found the regulation was reasonable even though no ready alternatives existed for Goodwin to exercise his right to procreate. Every alternative would compromise a prison policy or ex-

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142. *Id.* at 1396.

143. *Id.*

144. *Id.* at 1398.

145. *Id.* at 1396.

146. *Id.* at 1398.

147. *Id.*

148. Under a strict scrutiny standard, "a prison regulation passes constitutional muster if it is the least restrictive means to accomplish a legitimate penological objective." *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 332 (3d Cir. 1987) (citing *Procunier v. Martinez*, 416 U.S. 396 (1974)).

149. *Goodwin*, 908 F.2d at 1399.

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

151. *Id.*

152. *Id.* at 1398-99 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

153. *Id.* at 1399.

haust a large amount of prison resources to accommodate the similar requests of its female inmates.<sup>154</sup> Finally, the court feared that accommodating Goodwin's constitutional right would have a significant impact on other inmates, creating a ripple effect, which would force the prison to accommodate similar requests by female inmates and take resources away from security.<sup>155</sup>

2. *Gerber v. Hickman: The Right to Procreate Survives Incarceration and Restrictions on Prisoners' Exercise of Their Right Are Not Reasonably Related to Legitimate Penological Interests*

The Ninth Circuit's holding in *Gerber v. Hickman*<sup>156</sup> has opened the door for inmates seeking to procreate with their spouse while incarcerated through artificial means.<sup>157</sup> In *Gerber*, William Gerber, a California inmate sentenced to 100 years to life, sought to have a child by artificially inseminating his wife, a forty-six year old nonprisoner.<sup>158</sup> He offered to make all the necessary arrangements and cover all costs incurred to complete the procedure.<sup>159</sup> Gerber's request was denied by the California Department of Corrections ("CDC") because it violated state correctional regulations.<sup>160</sup> Gerber then brought suit against the prison warden and the CDC for an alleged violation of his fundamental right to procreate.<sup>161</sup> Following the district court's dismissal for failure to state a claim,<sup>162</sup> the appeal went to the Ninth Circuit to determine

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154. *Id.* at 1400.

155. *Id.*

156. *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001).

157. In *Gerber*, the Ninth Circuit held that the prison regulation restricting Gerber's right to procreate, specifically the right to artificially inseminate his wife, was not reasonably related to any legitimate penological interests. *Id.* at 892. However, the right to marital privacy via conjugal visits as a means of facilitating conception between a prisoner and civilian spouse has been denied constitutionally protected status. *See Hernandez v. Coughlin*, 18 F.3d 133, 136 (2nd Cir. 1994) (right to marital privacy and conjugal visits does not survive incarceration).

158. *Gerber*, 264 F.3d at 884. Gerber could not conceive with his wife through sexual intercourse because under CDC regulations, conjugal visits are prohibited for inmates "sentenced to life without the possibility of parole." *Id.* Because of his sentence and his wife's age, Gerber alleged that artificial insemination was the only method by which they could conceive a child together. *Id.*

159. *Id.* at 885.

160. The prison denied his request after determining the procedure was not medically necessary and that Gerber, as a prisoner, had not proven that the CDC violated any of his constitutional rights. *Id.*

161. *Id.* at 884.

162. *Gerber v. Hickman*, 103 F. Supp. 2d 1214, 1218 (E.D. Cal. 2000) ("Whatever right plaintiff has to artificial insemination, it does not survive incarceration.").

whether the fundamental right to procreate survives imprisonment,<sup>163</sup> and, if so, whether legitimate penological interests justified a restriction on Gerber's exercise of that right.<sup>164</sup>

The Ninth Circuit reversed the district court's dismissal of Gerber's claim, holding that because Gerber's fundamental right to procreate was not inconsistent with his status as a prisoner, it survived his incarceration.<sup>165</sup> Next, in analyzing whether the restriction on Gerber's right to procreate was justified, the court applied the *Turner* test.<sup>166</sup> It held that the CDC regulation was not reasonably related to any legitimate penological objectives.<sup>167</sup> The court made no mention of the *Martinez* standard.<sup>168</sup> Instead, the court cited *Skinner* and *Turner* as standing for the proposition that procreative rights survive incarceration.<sup>169</sup> However, the court did not ignore decisions from other circuit courts that might have favored an opposite holding, such as *Hernandez*<sup>170</sup> and *Toussaint*.<sup>171</sup>

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163. *Gerber*, 264 F.3d at 886.

164. *Id.*

165. *Id.* at 888, 890.

166. *Id.* at 886-87. For a discussion of the *Turner* test the four factors that the Court lists as relevant in determining the reasonableness of a regulation, see *supra* notes 110-122 and accompanying text.

167. *Gerber*, 264 F.3d at 892 (remanded for further consideration on issue of whether there exists a rational connection between the prison regulation and the legitimate governmental interests put forth to restrict Gerber's right to procreate).

168. For a discussion of the *Martinez* test, see *supra* notes 125-136 and accompanying text.

169. *Gerber*, 264 F.3d at 888-89

Taken together, *Turner* and *Skinner* suggest that the fundamental right of procreation may exist in some form while a prisoner is incarcerated, despite the fact that a prisoner necessarily will not be able to exercise that right in the same manner or to the same extent as he would if he were not incarcerated.

*Id.* For a discussion of *Turner*, see *supra* notes 70-77 and accompanying text, and for *Skinner*, see *supra* notes 65-69 and accompanying text.

170. *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) ("fundamental right to cohabit with [one's] spouse" does not survive incarceration). The *Gerber* court interpreted the Second Circuit's statement in *Hernandez*, "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting[.]" to suggest that the right to procreate survives incarceration, but that the exercise of that right can be restricted for legitimate penological reasons. *Gerber*, 264 F.3d at 888 (quoting *Hernandez*, 18 F.3d at 137).

171. *Toussaint v. McCarthy*, 801 F.2d 1080, 1113 (9th Cir. 1986) (holding that denial of contact visits does not violate Eighth Amendment). In confronting its own negative precedent, the Ninth Circuit noted that, "[I]t is not clear whether we based our holding on the argument that the 'right to contact visitation' did not survive incarceration or on the argument that the right did survive but that its exercise could be restricted by the prison authorities." *Gerber*, 264 F.3d at 890.

Rather, the court distinguished such cases from the exact issue at bar.<sup>172</sup>

In support of its holding that that the CDC regulation was not reasonably related to any legitimate penological objectives,<sup>173</sup> the court found that none of the rationales offered in favor of the regulation satisfied the first *Turner* factor.<sup>174</sup> The court rejected as insufficient the policy of treating men and women prisoners the same when possible,<sup>175</sup> the possible safety risks caused by prisoners collecting semen,<sup>176</sup> and concerns about the cost of litigation relating to the artificial insemination procedure,<sup>177</sup> all put forth by the prison to satisfy the first factor in *Turner*.<sup>178</sup> The court then remanded the case for a thorough consideration of whether legiti-

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172. The court found that the contact visitation and conjugal visit cases did not preclude its finding that the right to procreate survives incarceration. *Gerber*, 264 F.3d at 890. The court reasoned:

recognition that a general right to procreate exists during periods of imprisonment is not inconsistent with a holding that there is no specific right to conjugal or contact visits during such times, nor with the idea that a prison can restrict the exercise of the right to procreate in regard to conjugal visitation (a restriction similar to that on the right of association).

*Id.*

173. *Id.* at 892 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

174. *Id.* The first factor in *Turner* relevant in determining the reasonableness of a prison regulation is whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Id.* (quoting *Turner*, 482 U.S. at 89). The *Gerber* court did not consider the remaining three *Turner* factors because, under the Ninth Circuit’s interpretation of *Turner*, “satisfying the first *Turner* factor is ‘necessary, though not necessarily sufficient, to sustain a prison policy abridging constitutional rights.’” *Id.* at n.15. (quoting *Casey v. Lewis*, 4 F.3d 1516, 1523-24 (9th Cir. 1993)). For a discussion of the *Turner* test and the four factors which the Court listed as relevant in determining the reasonableness of a regulation, see *supra* notes 110-122 and accompanying text.

175. The court found that this policy was not implicated because the two sexes are not similarly situated and women cannot avail themselves of the narrow opportunity that *Gerber* seeks — to provide a semen specimen to his spouse so that she can be artificially inseminated. *Gerber*, 264 F.3d at 891 (citing *Nguyen v. INS*, 533 U.S. 53, 73 (2001)) (holding that there was no equal protection violation and acknowledging women’s and men’s most basic biological differences).

176. The court found this concern unpersuasive because *Gerber* offered to pay for medical supervision of the procedure for collecting his semen and his private lawyer offered to pick up the semen specimen directly from the prison. *Id.*

177. In rejecting this rationale, the court emphatically asserted that it was “reprehensible” to suggest that restricting protected constitutional rights “is justified by fear of increasing a party’s liability.” *Id.*

178. *Id.*

mate penological interests existed that would justify a total ban on Gerber's exercise of his right to procreate while incarcerated.<sup>179</sup>

## II. SHOULD THE RIGHT TO PROCREATE EXTEND TO PRISONERS?

### A. Analysis of Whether Procreative Rights Survive Incarceration

Deciding whether the right to procreate survives incarceration is the first step in determining whether an inmate has a right to procreate with an unincarcerated spouse.<sup>180</sup> According to the Supreme Court, the analysis for determining whether a right survives incarceration requires a two-prong inquiry: (1) whether there is a fundamental right involved,<sup>181</sup> and (2) whether that fundamental right is not "inconsistent with [one's] status as a prisoner."<sup>182</sup> As the following discussion illustrates, persuasive arguments have been made for and against a right to procreate upon incarceration.

#### 1. Arguments in Favor of Survival

The Supreme Court's decisions in *Skinner*, *Stanley*, and *Casey* unequivocally hold that the right to procreate is fundamental,<sup>183</sup> satisfying the first prong of the two-prong analysis.<sup>184</sup> Only the Ninth Circuit, however, has been bold enough to hold that the right to procreate survives incarceration.<sup>185</sup> This is primarily because other courts have found that the right to procreate fails the second part of the survival analysis. That is, it is inconsistent with the status of a prisoner.<sup>186</sup> Furthermore, although no court other than the

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179. *Id.* at 892-93. Being that Gerber was sentenced to life in prison, a total ban on his right to procreate during his prison term would presumably be for the rest of his natural life. *Id.*

180. *See id.* at 886. If the right is deemed fundamental and therefore to survive incarceration, the second step requires an inquiry into whether legitimate penological interests justify a restriction on a prisoner's exercise of that right. *Id.* at 886-87 (citing *Turner v. Safley*, 482 U.S. 78, 96-97 (1987)).

181. In the context of this Note, the alleged fundamental right is the right to procreate.

182. *Gerber*, 264 F.3d at 886 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

183. *Supra* notes 26-33 and accompanying text.

184. The first prong of the "survival analysis" is whether there is a fundamental right involved. *See Pell*, 417 U.S. at 822.

185. For a discussion of *Gerber*, see *supra* notes 156-179 and accompanying text.

186. *See, e.g., Anderson v. Vasquez*, 827 F. Supp. 617, 620 (N.D. Cal. 1992) (right to artificial insemination is "fundamentally inconsistent with imprisonment itself"), *aff'd in part, rev'd in part on other grounds*, 28 F.3d 104 (9th Cir. 1994) (unpublished mem. disposition) (issue of right to procreate in prison not ripe for adjudication); *Goodwin v. Turner*, 702 F. Supp. 1452, 1455 (D. Mo. 1988) (prisoners' right to procreate is

*Gerber* court has directly afforded such a right to prisoners,<sup>187</sup> other opinions, recognizing that a number of other fundamental rights survive incarceration, support an argument in favor of survival.<sup>188</sup>

In arguing that the fundamental right to procreate is not inconsistent with the status of a prisoner, the *Gerber* court began with a summary of the fundamental rights found to survive incarceration.<sup>189</sup> The court reasoned that *Skinner's* emphasis on the fundamental right to procreate for nonprisoners supports the notion that prisoners retain some form of procreative rights while incarcerated.<sup>190</sup> The court stated that *Turner* demonstrates how a right related to marriage and family may be exercised in prison even though an inmate cannot carry out the "typical" marriage while incarcerated.<sup>191</sup> Taken together, *Skinner* and *Turner* suggest that the fundamental right to procreate may exist in some form during imprisonment.<sup>192</sup>

The court also found that *Monmouth*<sup>193</sup> and *Hernandez*<sup>194</sup> support the idea that the right to procreate survives incarceration.<sup>195</sup> The court noted that the Third Circuit, in *Monmouth*, never doubted that the fundamental right to an abortion survives incarceration.<sup>196</sup> This right is closely related to rights concerning privacy, family, and procreation.<sup>197</sup> Moreover, the *Monmouth* court interpreted *Skinner* as including the right to procreate among the

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"fundamentally inconsistent with imprisonment itself"), *aff'd in part on other grounds*, 908 F.2d 1395 (8th Cir. 1990) (assuming, but not deciding, that the right to procreate survives incarceration and affirming on the basis that legitimate penological interests justified restriction of the right); *see also* *Gerber v. Hickman*, 103 F. Supp. 2d 1214, 1217-18 (E.D. Cal. 2000) (agreeing with the reasoning of the district courts in *Anderson* and *Goodwin*), *rev'd*, 264 F.3d 882 (9th Cir. 2001) (right to procreate survives incarceration), *rev'd en banc*, No. 00-16494, 2002 U.S. App. LEXIS 9749, at \*1 (9th Cir. May 23, 2002) (right to procreate does not survive incarceration).

187. *See Gerber*, 264 F.3d at 888.

188. *See supra* notes 52-87 and accompanying text.

189. *Gerber*, 264 F.3d at 887. For a discussion of these rights, *see supra* notes 52-87 and accompanying text.

190. *Gerber*, 264 F.3d at 889.

191. *Id.*

192. *Id.*

193. For a discussion of *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), *see supra* notes 84-87 and accompanying text.

194. For a discussion of *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994), *see supra* notes 91-96 and accompanying text.

195. *Gerber*, 264 F.3d at 889.

196. *Id.* at 889 n.8.

197. *Carey v. Population Services Int'l*, 431 U.S. 678, 684-85 (1977) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

significant rights of privacy that the Supreme Court has found to survive incarceration.<sup>198</sup> Although the Second Circuit denied any constitutional right to conjugal visits while incarcerated,<sup>199</sup> the *Gerber* court found that the language in *Hernandez* suggests that the right to procreate survives incarceration.<sup>200</sup> The court maintained that the *Hernandez* court intended to reject only the narrow right to conjugal visitation.<sup>201</sup> The court reasoned that the *Hernandez* court's statement that, "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting,"<sup>202</sup> suggests that a broader right to procreate survives incarceration, but the exercise of that right can be restricted for legitimate penological reasons.<sup>203</sup> Furthermore, the court concluded that recognizing a general right to procreate during imprisonment is not inconsistent with a holding that there is no right to conjugal visits in prison, nor is recognizing a right to procreate through artificial means inconsistent with one's status as a prisoner.<sup>204</sup>

In his spirited dissent in *Goodwin*,<sup>205</sup> Judge McMillian argued in favor of the survival of procreative rights during incarceration. Like the court in *Gerber*, Judge McMillian cited *Skinner*, *Turner*, and *Monmouth* as examples of other privacy rights of personal choice in family matters that survive incarceration.<sup>206</sup> In addition, he offered his own reasons why the right to procreate should survive imprisonment. Judge McMillian rejected the idea that a denial of the right to procreate in prison is not a constitutional violation because it only delays the exercise of that right until release.<sup>207</sup> This reasoning is faulty, he argued, because if it were true, few, if any, constitutional rights would survive incarceration insofar as nearly all inmates will be released at some time in the future. Thus, it can almost always be said that the exercise of an asserted right is merely "delayed."<sup>208</sup>

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198. *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 334 n.11.

199. *Hernandez*, 18 F.3d at 137.

200. *Gerber*, 264 F.3d at 889.

201. *Id.*

202. *Hernandez*, 18 F.3d at 137.

203. *Gerber*, 264 F.3d at 889.

204. *Id.* at 890.

205. *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990) (McMillian, J., dissenting).

206. *Id.* at 1402-03 (McMillian, J., dissenting).

207. *Id.* at 1403 n.2 (McMillian, J., dissenting).

208. *Id.* (McMillian, J., dissenting).



Judge McMillian also reasoned, in differently than the *Gerber* court,<sup>209</sup> that *Skinner's* prohibition against sterilizing prisoners promotes the idea that the right to procreate survives incarceration. Because *Skinner* preserves an incarcerated prisoner's biological capacity to procreate for use upon release,<sup>210</sup> the right to procreate should survive incarceration.<sup>211</sup> Otherwise, if the right to procreate extinguished upon incarceration, then presumably prisons would be free to sterilize prisoners and remove their capacity to procreate,<sup>212</sup> which was found unconstitutional in *Skinner*.<sup>213</sup> In a conclusion that embodies the arguments favoring the survival of procreative rights upon incarceration, Judge McMillian stated, "Like the rights to marry, to be free of compulsory sterilization, and to choose to terminate a pregnancy, the right to procreation is within that cluster of constitutionally protected choices that survives incarceration."<sup>214</sup>

## 2. Arguments Against Survival

Some courts have rejected the idea that procreative rights survive incarceration. In doing so, courts have relied on the second prong of the "survival analysis," finding that the right to procreate is inconsistent with one's status as a prisoner. Other courts, while not ultimately deciding the issue, have nonetheless also raised valid objections.<sup>215</sup>

At least one circuit court has refused to hold that the right to procreate survives incarceration. The Eighth Circuit chose only to assume, without deciding, that the right survives incarceration,<sup>216</sup> and held that the prison restriction on Goodwin's assumed right to procreate by artificial insemination was justified because it was reasonably related to furthering legitimate penological objectives.<sup>217</sup>

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209. *Id.* at 1402-03 (McMillian, J., dissenting).

210. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

211. *Goodwin*, 908 F.2d at 1402-03 (McMillian, J., dissenting).

212. *Id.* (McMillian, J., dissenting).

213. *Skinner*, 316 U.S. at 541.

214. *Goodwin*, 908 F.2d at 1403 (McMillian, J., dissenting) (citing *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977)).

215. *E.g., id.* at 1398 (declining to hold that the right to procreate survives incarceration); *Percy v. State Dep't of Corr.*, 651 A.2d 1044, 1047 (N.J. Super. Ct. App. Div. 1995) (declining to hold that the right to procreate survives incarceration); *see also State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001) (stating that imprisonment would eliminate a prisoner's right to procreate, considering a claim alleging that a condition of parole unconstitutionally violated a paroled prisoner's fundamental right to procreate).

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

217. *Id.* at 1400.

The explanation offered by the district court in *Goodwin*<sup>218</sup> centered around one “insurmountable obstacle” — incarceration.<sup>219</sup> Even though the district court was willing to stretch the legal boundaries necessary to recognize the survival of the fundamental right to procreate,<sup>220</sup> it could not go so far as to say that the right is fundamentally inconsistent with the notion of imprisonment.<sup>221</sup> The court cited the need to accommodate the myriad of prison-system objectives.<sup>222</sup> The court was not swayed by *Skinner*.<sup>223</sup> The majority distinguished *Skinner* because it involved a permanent deprivation of the means to procreate, rather than a mere delay.<sup>224</sup> The court found absolutely no comparison between the “devastating effects” of sterilization in *Skinner* and the denial of the opportunity to exercise the right to procreate while incarcerated.<sup>225</sup>

The district court also concluded that *Turner* supported the argument against the survival of the right to procreate.<sup>226</sup> The court emphasized the *Turner* Court’s holding that, “[T]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration.”<sup>227</sup> Based on that holding, the court found that many aspects of marriage that make it a fundamental right, such as cohabitation, sexual intercourse, and bearing and rearing children, are necessarily superseded by confinement.<sup>228</sup> The district court concluded that the right to beget a child “falls within this realm of unavailable ‘incidents of marriage.’”<sup>229</sup>

The district courts in *Anderson v. Vasquez* and *Gerber v. Hickman* both cited the district court’s reasoning in *Goodwin* to support their holdings that the right to procreate is inconsistent with the

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218. *Goodwin v. Turner*, 702 F. Supp. 1452, 1455 (D. Mo. 1988) (holding that prisoners’ right to procreate is “fundamentally inconsistent with imprisonment itself”), *aff’d in part on other grounds*, 908 F.2d 1395 (8th Cir. 1990) (assuming, but not deciding, that the right to procreate survives incarceration and affirming on the basis that legitimate penological interests justified restriction of the right).

219. *Id.* at 1453.

220. *Id.*

221. *Id.* at 1454.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 95 (1987)).

228. *Id.*

229. *Id.* (referring specifically to artificial insemination as a method of begetting a child).

status of a prisoner.<sup>230</sup> Both cases were subsequently reversed by the Ninth Circuit.<sup>231</sup> The *Gerber* district court reasoned that because inmates have no constitutional right to marital intimacy while incarcerated,<sup>232</sup> it follows that they generally have no right to procreate while in prison.<sup>233</sup> In addition, the *Gerber* district court rejected an equal protection justification for allowing the right to procreate to survive incarceration.<sup>234</sup> The court did not accept the argument that a prison regulation not requiring an abortion if female inmates are, or become, pregnant during incarceration allows female inmates, unlike male inmates, to maintain both the right to procreate and the right to make decisions regarding procreation.<sup>235</sup> The court found that men and women are not similarly situated with respect to the termination of a pregnancy, because males cannot become pregnant.<sup>236</sup> Furthermore, men and women are treated the same because neither are permitted conjugal visits or a means to procreate while in prison.<sup>237</sup>

In *Percy v. State of New Jersey, Department of Corrections*,<sup>238</sup> Robert Percy<sup>239</sup> sued the New Jersey Department of Corrections (“DOC”) alleging that its denial of his request to artificially inseminate his wife<sup>240</sup> violated his fundamental right to procreate.<sup>241</sup> The court, citing to the Eighth Circuit in *Goodwin* and the district court in *Anderson*,<sup>242</sup> noted that, at the time, no court had recognized an inmate’s constitutional right to procreate. Percy argued that the

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230. *Gerber v. Hickman*, 103 F. Supp. 2d 1214, 1216-17 (E.D. Cal. 2000); *Anderson v. Vasquez*, 827 F. Supp. 617, 620-21 (N.D. Cal. 1992).

231. *Gerber*, 103 F. Supp. 2d at 1214, *rev’d*, 264 F.3d 882 (9th Cir. 2001) (right to procreate survives incarceration), *rev’d en banc*, No. 00-16494, 2002 U.S. App. LEXIS 9749, at \*1 (9th Cir. May 23, 2002) (right to procreate does not survive incarceration); *Anderson*, 827 F. Supp. 617, *aff’d in part, rev’d in part on other grounds*, 28 F.3d 104 (9th Cir. 1994) (unpublished mem. disposition) (issue of right to procreate in prison not ripe for adjudication).

232. *Gerber*, 103 F. Supp. 2d at 1216 (citing *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (holding that the Constitution does not create any protected guarantee to conjugal visitation privileges while incarcerated)).

233. *See id.*

234. *Id.* at 1218.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Percy v. State Dep’t of Corr.*, 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995).

239. Percy was forty-five years old at the time and was sentenced for homicide in 1985 to a life term with a thirty-year term of parole ineligibility. *Id.*

240. Percy’s wife was thirty-six at the time and married Percy in 1986 while he was incarcerated. *Id.* at 1045.

241. *Id.* at 1044.

242. *Id.* at 1045.

right to procreate survives incarceration,<sup>243</sup> but the court did not rule on the issue.<sup>244</sup> Rather, the court assumed that his right to procreate survived incarceration, but then held that sufficient, valid penological interests justified the DOC restriction on Percy's ability to exercise that right.<sup>245</sup>

Even though the court did not expressly hold that the right to procreate does not survive incarceration, it made a strong argument favoring that position. In upholding a prisoner's fundamental right to marry, the court pointed out that the *Turner* Court did not hold that the right to procreate, as an integral part of the marital relationship, also survived incarceration.<sup>246</sup> Rather, the *Turner* Court merely recognized a number of aspects of marriage which "are unaffected by the fact of confinement or the pursuit of legitimate corrections goals," including emotional and public commitment, spiritual significance, and the right to consummation after release on parole or commutation.<sup>247</sup> Notably, however, *Turner* did not mention the right to procreate.<sup>248</sup>

In *Wisconsin v. Oakley*, David Oakley, a prisoner granted parole, brought suit against the state alleging that a condition of his parole, dictating that he not father another child unless he could show that he could support that child and his current children, unconstitutionally deprived him of his right to procreate.<sup>249</sup> The Supreme Court of Wisconsin, while acknowledging that the condition infringed upon Oakley's right to procreate, found it to be reasonably related to his rehabilitation and not overly broad.<sup>250</sup> Furthermore, the court reasoned that, "Simply put . . . Oakley . . . could have been imprisoned for six years, which would have eliminated

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243. *Id.* at 1046 (rejecting Percy's offering of the Third Circuit's rationale in *Monmouth* to support the idea that the right to procreate survives incarceration).

244. *Id.* at 1047.

245. *Id.* ("We conclude that . . . even if [Percy] does have a fundamental right to procreate . . . sufficient, valid penological concerns . . . justify the DOC's policy . . . against inmate procreation.")

246. *Id.* at 1046.

247. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). The Court also included religious significance as a protectable aspect of marriage and justified inmate marriage as a precondition to the receipt of government benefits (e.g., Social Security), property rights and other, less tangible benefits (e.g., legitimization of children born out of wedlock).

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

249. *State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001).

250. *Id.* at 201-02, 212 (stating that the condition does not forever extinguish Oakley's right to procreate if he can satisfy the condition of his probation by making efforts to support his children).

his right to procreate altogether during those six years.”<sup>251</sup> Implicit in this statement is that the right to procreate is automatically extinguished upon incarceration, foreclosing any argument for the survival of the right. Moreover, the court went on to state that, “[I]ncarceration, by its very nature, deprives . . . other fundamental rights, such as the right to procreate.”<sup>252</sup>

### **B. *Turner* or *Martinez*: The Standard of Review for Determining Whether Prison Regulations Violate an Incarcerated’s Right to Procreate**

Determining whether the fundamental right to procreate survives incarceration is only the first step in the process of answering the question of whether an inmate has a right to procreate during incarceration.<sup>253</sup> Assuming the right to procreate is found to survive incarceration, step two entails applying the proper standard of review to determine whether a prison regulation unconstitutionally restricts a prisoner’s ability to exercise that right.<sup>254</sup> The Supreme Court has never formulated such a standard of review.<sup>255</sup> This Section presents the arguments for applying one of the two standards courts will most likely apply, either the *Martinez* or the *Turner* standard. Because prisoners’ exercise of the right to procreate through traditional means, meaning, conception through direct sexual intercourse via conjugal visits, has not been recognized as a constitutionally protected right,<sup>256</sup> the following analysis focuses on regulations that restrict the right to procreate via artificial means.

#### *1. Prison Regulations Affecting Nonprisoners Support an Application of the Martinez Standard*

In *Turner*, the Supreme Court noted that a regulation prohibiting marriages between inmates and civilians “may support application of the *Martinez* standard,<sup>257</sup> because the regulation may entail a ‘consequential restriction on the [constitutional] rights of those

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251. *Id.* The court cited no authority to support this conclusion.

252. *Id.* at 209.

253. *See* Gerber v. Hickman, 264 F.3d 882, 886 (9th Cir. 2001).

254. *Id.* at 886-87.

255. *See* DeOliveira, *supra* note 115, at 201-02.

256. *See* Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994) (holding that the “fundamental right to cohabit with [one’s] spouse” does not survive incarceration).

257. The *Martinez* test validates a prison regulation only if two requirements are satisfied: (1) The regulation “furthers an important or substantial governmental interest;” and (2) the regulation is not more restrictive “than is necessary or essential to the protection of the particular governmental interest involved.” *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

who are not prisoners.'<sup>258</sup> However, the Court never reached this question because it found the marriage regulation to fail the less demanding *Turner* reasonable relationship test.<sup>259</sup> Although not deciding this issue, the Court's suggestion of the possible application of *Martinez* lends credibility to the argument in favor of applying the *Martinez* standard in cases where a prison regulation may violate the constitutional rights of nonprisoners. The *Martinez* standard, at the very least, has been held to apply to prison regulations restricting the outgoing correspondence of inmates,<sup>260</sup> even if it does not apply to cases involving prison regulations that infringe upon the constitutional rights of civilians.

A second consideration in favor of applying *Martinez* is that an unincarcerated spouse's fundamental right to procreate is completely foreclosed by a prison restriction on the incarcerated spouse's ability to procreate, unlike similar restrictions on prisoners' other privacy and marital rights, such as the constitutional right to freedom of association.<sup>261</sup> An unincarcerated wife can exercise the right to freedom of association, to some extent, by visiting her husband while he is incarcerated and by freely associating with persons outside of prison.<sup>262</sup> However, an unincarcerated wife cannot procreate with her imprisoned husband until he is released,<sup>263</sup> and she has no other options, short of infidelity. Moreover, if her husband is a life-term prisoner, she may never have the opportunity to exercise her constitutional right to procreate within the marital relationship.<sup>264</sup> These harsh consequences on faultless spouses may well persuade a court to apply the more stringent *Martinez* stan-

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258. *Turner v. Safley*, 482 U.S. 78, 97 (1987) (quoting *Martinez*, 416 U.S. at 409).

259. *Id.*

260. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

261. See *infra* notes 320-322 and accompanying text.

262. *Goodwin v. Turner*, 908 F.2d 1395, 1406 n.6 (8th Cir. 1990) (McMillian, J., dissenting).

263. *Id.* (McMillian, J., dissenting). Another significant effect of these restrictions on female prisoners and unincarcerated female spouses, which is greater than the effect of mere delay, is an increased likelihood of bearing a child with genetic abnormalities due to increased maternal age. *Id.* (McMillian, J., dissenting). The average woman, age thirty, who waits five years to conceive a child is approximately twice as likely to give birth to a child with Down's syndrome, or a chromosomal abnormality. *Id.* (McMillian, J., dissenting). The overall risk for all age groups of giving birth to a child with Down's syndrome is 1 in 650 and the risk of giving birth to a child with a chromosomal abnormality is 1 in 200-300. *Id.* at 1397 (McMillian, J., dissenting). For a woman about thirty years old, the same risks are as low as 1 in 500 for Down's syndrome and 1 in 300 for a chromosomal abnormality. For a woman about thirty-five years old, the same risks are as low as 1 in 450, and 1 in 225, respectively. *Id.* (McMillian, J., dissenting).

264. See *id.* (McMillian, J., dissenting).

dard over the less burdensome *Turner* test when reviewing restrictions on prisoners' right to procreate.

2. *Applying the Martinez Standard to Prison Regulations on Inmates' Right to Procreate*

No court has ever applied the *Martinez* standard to a case involving a prison regulation that restricts a prisoner's fundamental right to procreate.<sup>265</sup> Nevertheless, the *Martinez* test validates a prison regulation only if two requirements are satisfied: (1) the regulation "furthers an important or substantial governmental interest;"<sup>266</sup> and (2) the regulation is not more restrictive "than is necessary or essential to the protection of the particular governmental interest involved."<sup>267</sup>

a. *Argument in Favor of Restriction*

The following subsections consider the possible arguments for applying *Martinez* to prison restrictions in the context of procreation.

i. *Restrictions on Prisoners' Right to Procreate Furthers Important and Substantial Governmental Interests*

The *Martinez* Court held that for a prison regulation to be valid, it must further substantial government interests of rehabilitation, order, and security.<sup>268</sup> Prison administrators can argue that restrictions on prisoners' right to procreate further the substantial governmental interest of rehabilitation.<sup>269</sup> Depriving prisoners of the

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265. See, e.g., *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001) (applying *Turner* test to prison regulation restricting prisoners' ability to procreate); *Goodwin*, 908 F.2d at 1395 (same); *Percy v. State Dep't of Corr.*, 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995) (same); see also *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (applying the *Turner* test to a prison regulation restricting female prisoners' ability to exercise the right to a nontherapeutic abortion).

266. The Court required a showing that a regulation furthers one or more of the substantial governmental interests of security, order, and rehabilitation. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). For a discussion of *Martinez*, see *supra* notes 125-136 and accompanying text.

267. *Martinez*, 416 U.S. at 413. "Thus, a restriction . . . that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* at 413-14. Any regulation must be generally necessary to protect one or more of the legitimate governmental interests of security, order, and rehabilitation. *Id.* at 413.

268. *Id.*

269. See *id.*

right to procreate may help to deter them from committing more criminal acts in the future.<sup>270</sup>

In attempting to further the governmental interest of maintaining order within the institution, prison administrators can raise equal protection concerns in support of restrictions on inmate procreation.<sup>271</sup> For instance, if a prison permits a male inmate to exercise his right to procreate by artificial means, the prison may face intense pressure from female inmates seeking similar accommodations.<sup>272</sup> Prison administrators could also argue that, even if a prison could constitutionally provide accommodations for only one gender to procreate, the result of providing those accommodations would likely reduce the availability of resources necessary for maintaining internal security.<sup>273</sup>

Prison administrators could identify other legitimate security interests similar or identical to those raised by prison administrators under the *Turner* standard to support restrictions on prisoners' right to procreate.<sup>274</sup> The prison administrators' argument under the *Martinez* standard would have to be that these regulations further the substantial governmental interest of preventing safety risks caused by prisoners collecting semen.<sup>275</sup> Prison administrators have argued that the procedure for collecting semen samples from inmates would create a substantial risk of "gassing"<sup>276</sup> or that inmates might send their semen specimens through the mail to unsuspecting individuals.<sup>277</sup> Because proper deference must be given to the expert judgment of prison officials<sup>278</sup> and security is the core function of prison administration,<sup>279</sup> these security concerns arguably further a substantial government interest.<sup>280</sup>

In *Martinez*, the Court found that the correspondence regulations invited prison officials to apply their own personal prejudices

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270. See *State v. Oakley*, 629 N.W.2d 200, 212-13 (Wis. 2001) (holding that denying an inmate the right to procreate is reasonably related to the goal of rehabilitation).

271. See *infra* notes 326-329 and accompanying text; see also *Percy v. State Dep't of Corr.*, 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div. 1995).

272. See *Goodwin v. Turner*, 908 F.2d 1395, 1399-1400 (8th Cir. 1990).

273. See *Percy*, 651 A.2d at 1046.

274. *Turner v. Safley*, 482 U.S. 78, 97 (1987).

275. See *Gerber v. Hickman*, 264 F.3d 882, 890 (9th Cir. 2001).

276. "Gassing" is the act of prisoners misusing their semen by throwing it on others. *Id.* at 891.

277. *Id.*

278. *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (stating that courts should defer to "expert judgment" of prison authorities) (quoting *Bell v. Wolfish*, 441 U.S. 520, 540-41(1979)).

279. *Turner*, 482 U.S. at 92.

280. See *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).



as standards for deciding which of the correspondences to censor. The Court found that this was one reason why the regulations failed to further an important or substantial governmental interest.<sup>281</sup> However, the prison restrictions on the exercise of inmates' right to procreate have been blanket prohibitions.<sup>282</sup> Prison officials have no opportunity to inject their own personal prejudices when enforcing such regulations. Therefore, prison administrators could argue that blanket prohibitions allow only for objective enforcement, unlike the correspondence regulations in *Martinez*. This objective enforcement supports the legitimacy of the regulations in furtherance of the substantial governmental interest in maintaining prison security.

ii. Regulations Prohibiting Procreation Are Not More Restrictive Than Is Necessary or Essential

If the prison regulation satisfies the first prong of the *Martinez* test, furthering important and substantial governmental interests, the next requirement is that the regulation must not be more restrictive than necessary.<sup>283</sup> Prison administrators can argue that despite the fact that civilian spouses' rights are also directly implicated, a total restriction on inmates' right to procreate is justified as the only sure means of maintaining prison security and order.<sup>284</sup> In support of this argument, prisons administrators could rely on court decisions finding that blanket prohibitions on prisoners' rights to procreation,<sup>285</sup> contact visitation,<sup>286</sup> and conjugal visitation are not overly restrictive.<sup>287</sup> Moreover, allowing some prisoners to procreate while incarcerated could cause significant security risks and internal disorder. This is especially true if the prison would have to allow private medical technicians to enter to collect semen,<sup>288</sup> or if women wishing to donate an egg for artificial

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281. *Id.* at 415.

282. *See, e.g.,* *Goodwin v. Turner*, 908 F.2d 1395, 1398-99 (8th Cir. 1990).

283. *See Martinez*, 416 U.S. at 413.

284. *See Goodwin*, 908 F.2d at 1398.

285. *See id.* at 1400.

286. In *Block v. Rutherford*, 468 U.S. 576, 586, 592 (1984), the Supreme Court upheld a blanket prohibition on contact visitation with pretrial detainees. The Court held that the ban on contact visits was necessary to achieve the jail's legitimate interest in maintaining security. *Id.* at 586.

287. *See Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (holding that the Constitution does not create any protected guarantee to conjugal visits while imprisoned).

288. *See Goodwin*, 908 F.2d at 1398.

reproduction required access to outside medical facilities.<sup>289</sup> In sum, prison administrators could claim that the only way to treat all inmates equally,<sup>290</sup> and to maintain a prison's vital internal security<sup>291</sup> is to completely prohibit inmate procreation.

*b. Argument Against Restriction*

The following subsections consider the possible arguments against applying *Martinez* to prison restrictions in the context of procreation.

i. Restrictions on Prisoners' Right to Procreate Do Not Further Important and Substantial Governmental Interests

In arguing against restrictions on prisoners' right to procreate, prisoners could maintain that none of the substantial governmental interests of rehabilitation, order, or security are furthered as a result of such restrictions.<sup>292</sup> First, a prisons' interest in rehabilitation as a justification for prohibitions on prisoners' right to procreate is arguably tenuous at best.<sup>293</sup> Depriving prisoners of the right to procreate may contribute to ego degradation and feelings of worthlessness.<sup>294</sup> As a result, rehabilitation is not furthered by such restrictions; it is retarded.<sup>295</sup>

In addition, prisoners could argue that equal protection concerns do not justify prison restrictions on inmates' right to procreate.<sup>296</sup> For instance, female inmates cannot avail themselves of the same method of procreation that male inmates can, which is to simply

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289. The most common form of assisted reproduction for women is a process called "in-vitro" fertilization. Meena Lal, Comment, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 *COMPUTER & HIGH TECH. L.J.* 517, 520 (1997) (arguing that new reproductive technologies require increased federal regulation to protect society). The procedure entails a surgical removal of eggs from female ovaries for fertilization outside the body. *Id.* After their successful removal, the eggs are transferred to a culture medium, where sperm are prepared for insemination. *Id.* at 521. Upon sufficient development of the embryo outside the uterus, the embryo is transferred into the uterus of either the egg donor, or a surrogate. *Id.* Pregnancy is achieved if implantation occurs. *Id.* at 522.

290. See *Goodwin*, 908 F.2d at 1398.

291. See *Turner v. Safley*, 482 U.S. 78, 92 (1987).

292. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

293. See *id.* at 413.

294. See *infra* notes 418-423.

295. See, e.g., Davis, *supra* note 3, at 173 n.66 (stating that commentators suggest that conjugal visits strengthen rehabilitative efforts).

296. See *Gerber v. Hickman*, 264 F.3d 882, 891 (9th Cir. 2001) (allowing male inmates to procreate via artificial insemination does not violate the equal protection clause because males and females are not similarly situated due to basic biological differences).

provide a semen sample to their spouses so that they may be artificially inseminated.<sup>297</sup> Unlike male inmates, female inmates would necessarily require outside medical attention or facilities to procreate via artificial means. Male inmates, however, could complete the semen collection procedure from inside their own prison cells.<sup>298</sup> Because of their differences, male prisoners could claim that the narrow right to provide semen to artificially inseminate one's spouse does not apply to female inmates. Therefore, the policy of treating male and female inmates equally, to the extent possible, is not furthered by a blanket restriction on inmate procreation.<sup>299</sup>

Finally, prisoners could argue that such regulations do not further important prison security interests such as inmate or guard safety.<sup>300</sup> No legitimate security threat is posed, for example, by providing male inmates with a sterile container to deposit semen samples in, and by allowing inmates to either mail or personally transfer the samples to their own spouses or doctors.<sup>301</sup> Neither guards, nor other prisoners would be involved with, or be affected by, the semen collection process.<sup>302</sup> Therefore, security interests are arguably not furthered by prison regulations that restrict inmates' right to procreate while incarcerated.<sup>303</sup>

## ii. Regulations Prohibiting Procreation Are More Restrictive Than Is Necessary or Essential

With regard to important prison interests, prisoners can argue that regulations restricting their right to procreate while incarcerated are not narrowly drawn.<sup>304</sup> Prisoners can maintain that prison administrators fail to demonstrate that the important interests of

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297. *See id.*

298. *See id.*

299. *See id.*; *see also* *Goodwin v. Turner*, 908 F.2d 1395, 1406 (8th Cir. 1990) (McMillian, J., dissenting) (stating that equal treatment is not rationally furthered by denying all inmates a constitutional right simply because it might be legitimately denied to some).

300. *See Gerber*, 264 F.3d at 891 (stating that the prison did not sufficiently suggest how the ban could possibly lead to security problems such as flash riots).

301. *See Goodwin*, 908 F.2d at 1400 n.7 (McMillian, J., dissenting) (stating that providing a clean container to deposit semen in is not very intrusive and finding a prison's interest in treating all inmates equally to be the only legitimate interest that justified a total restriction on prisoners' right to procreate).

302. *See Gerber*, 264 F.3d at 891 (rejecting prison's argument that the procedure for collecting semen created an unacceptable security risk).

303. *See id.*

304. *See Procnier v. Martinez*, 416 U.S. 396, 416 (1974) (invalidating a prohibition on the sending of prisoner correspondence containing inflammatory views that clearly

rehabilitation, order, and security are furthered by restrictions on inmate procreation.<sup>305</sup> A possible alternative to an overly broad, total prohibition on procreation is for prison administrators to recognize the basic biological differences between men and women.<sup>306</sup> At the very least, prison administrators should allow male inmates a limited right to provide a semen sample to artificially inseminate their spouse, provided that the procedure meets certain prison policy requirements. For instance, such a request could be granted if the inmate could produce the semen sample without specialized medical attention inside his own cell and if only minimal prison resources need to be expended to accommodate the procedure.<sup>307</sup> Such a restriction would not be more restrictive than is essential. Moreover, it would not seem to offend equal protection concerns of female inmates because women are incapable of completing a similar process inside their cells.<sup>308</sup> Alternatively, prisoners could claim that regulations totally prohibiting the right to procreate for all inmates, regardless of the method of procreation or costs of the asserted procedure, are far broader than legitimate prison interests demand.<sup>309</sup>

### 3. *Prison Regulations Affecting Prisoners Support an Application of the Turner Standard*

The Supreme Court has explained that the *Turner* test<sup>310</sup> is the proper standard for determining the validity of a restriction that allegedly infringes upon an inmate's constitutional rights.<sup>311</sup> Thus,

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presented a danger to prison security on the basis that the regulation was not narrowly drawn).

305. See *Gerber*, 264 F.3d at 891-92; *Goodwin*, 908 F.2d at 1404-06 (McMillian, J., dissenting).

306. See *Gerber*, 264 F.3d at 891.

307. See *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting).

308. See generally *Gerber*, 264 F.3d at 891 (allowing male inmates to procreate via artificial insemination for it does not violate equal protection clause because males and females are not similarly situated due to basic biological differences); *Goodwin*, 908 F.2d at 1406 (McMillian, J., dissenting) (stating that equal treatment is not rationally furthered by denying all inmates a constitutional right simply because it might be legitimately denied to some).

309. See *Martinez*, 416 U.S. at 416 (holding that regulations authorizing censorship of prisoner mail were far broader than demanded by any legitimate prison interest).

310. In *Turner*, the Court espoused a test more deferential to prison administrators than the *Martinez* test, holding that a prison "regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). For a further discussion of the *Turner* test, see *supra* notes 110-122 and accompanying text.

311. *Goodwin*, 908 F.2d at 1398 (quoting *Washington v. Harper*, 494 U.S. 210 (1990)).

the most basic argument for applying the *Turner* test in cases involving prison restrictions on inmates' right to procreate is that such restrictions implicate the constitutional rights of prisoners.<sup>312</sup> In furtherance of this argument, the Court has held that the *Turner* standard must be applied 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."<sup>313</sup> This language suggests that *Turner* is the proper constitutional standard to apply even in the face of the *Martinez* standard.

Also weighing in favor of applying the *Turner* standard is the fact that, in recent years, the Court has considerably narrowed *Martinez*.<sup>314</sup> In *Thornburgh v. Abbott*,<sup>315</sup> the Court limited *Martinez* to apply to outgoing inmate correspondence.<sup>316</sup> Also, the Court appeared to retreat from its previous position that heightened scrutiny is proper when the rights of civilians, as well as inmates, are implicated by prison regulations.<sup>317</sup> The ruling in *Thornburgh* reverts to deferring to the decisions of prison administrators.<sup>318</sup> As a result, after the *Thornburgh* decision, what remains of *Martinez's* concern for the rights of nonprisoners implicated by prison restrictions is unsettled.<sup>319</sup>

Another view in favor of applying *Turner* is that incarceration necessarily deprives a prisoner of the freedom "to be with family and friends and to form the other enduring attachments of normal life."<sup>320</sup> Imprisonment naturally affects a prisoner's family.<sup>321</sup> It deprives a wife of her constitutional right to freedom of association by way of prison regulations that limit her ability to visit her hus-

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312. *Id.* at 1399.

313. *Id.* at 1398-99 (quoting *Harper*, 494 U.S. at 223).

314. *Id.* at 1401 n.1 (McMillian, J., dissenting); Davis, *supra* note 3, at 181.

315. *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

316. In *Thornburgh*, the Supreme Court explicitly overruled *Martinez* as the applicable standard for incoming correspondence. *Id.* at 413. However, the Court noted that *Martinez* continued to apply to regulations restricting outgoing correspondence. *Id.*

317. *Id.* at 410 n.9 ("[W]e do not think it sufficient to focus, as respondents urge, on the identity of the individuals whose rights have allegedly been infringed."). The *Thornburgh* Court declined to create different standards for prisoner rights and non-prisoner rights cases. *Id.*

318. Davis, *supra* note 3, at 185.

319. *See id.* at 181.

320. *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

321. *Id.*

band in prison.<sup>322</sup> These are the by-products of incarceration. Therefore, prison regulations that infringe on the constitutional rights of the unincarcerated should still be subjected to the *Turner* reasonable relationship test and not a more stringent standard.<sup>323</sup> The *Turner* test should apply when prison restrictions on a prisoner's right to procreate also affects a prisoner's spouse's right to procreate. Simply put, a prison regulation should not be subjected to strict scrutiny whenever a prisoner's family members are also affected.<sup>324</sup>

4. *Applying the Turner Standard to Prison Regulations on Inmates' Right to Procreate*

The arguments in favor of, and against, permitting restrictions on a prisoner's right to procreate are discussed below, based on the four factors outlined in *Turner*.

a. *Prison Regulations Restricting Prisoners' Fundamental Right to Procreate Are Reasonably Related to Legitimate Penological Interests*

i. *Factor 1: Whether a Valid, Rational Connection Exists Between the Prison Regulation and the Legitimate Governmental Interest Put Forward to Justify It*

The Third Circuit, in *Monmouth*, stated that "encouraging child-birth in the prison context furthers none of the traditionally recognized penological objectives."<sup>325</sup> Treating all inmates equally is one penological objective argued as being rationally related to prison regulations that restrict a prisoner's right to procreate.<sup>326</sup> The Eighth Circuit gave considerable weight to this argument in *Goodwin*, holding that if the prison was forced to accommodate male prisoners' right to procreate, it would have to confer a corresponding benefit on its female inmates.<sup>327</sup> Therefore, the court found

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322. *Id.*

323. *See id.*

324. *See id.*

325. *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 342-43 (3d Cir. 1987) (offered in support of the court's holding that all female inmates have a constitutional right to elect to exercise their fundamental right to an abortion).

326. *Goodwin*, 908 F.2d at 1399-400.

327. *Id.* at 1400. The court did not hold, as a matter of constitutional law, that if *Goodwin* was allowed to procreate, then all female prisoners must be afforded the same right. Rather, the court found only that, as a matter of the prison's internal policy, if male inmates were allowed to procreate, then the prison would have been forced to accord a similar right to female inmates or else compromise its legitimate policy. *Id.* at 1400 n.7.

that prisons do not have to allow male prisoners to procreate because they cannot afford to expand medical services for female prisoners who wish to exercise their right to procreate as well.<sup>328</sup> The court expressed serious concern with how the additional financial burden of infant care, to accommodate female inmates, would impact the allocation of prison resources for other necessary programs and security needs.<sup>329</sup> Consequently, the court declared the “interest [of treating all inmates equally] a legitimate penological interest.”<sup>330</sup>

Another governmental objective offered in support of restrictions on prisoners’ right to procreate pertains to security interests.<sup>331</sup> The assertion here is that these regulations are rationally related to the prison’s interest of preventing safety risks caused by prisoners collecting semen.<sup>332</sup> As a result, prison administrators argue that the most efficient and effective way for prisons to maintain an adequate level of security is to fully prohibit exercise of the right.<sup>333</sup>

Prison administrators have also contended that administrative and financial burdens are legitimate penological interests that may justify certain prison regulations.<sup>334</sup> Providing the means for prisoners to procreate would be too great a drain on the limited resources of the prison system.<sup>335</sup> Effectuating criminal deterrence<sup>336</sup> and preventing a risk of liability for prisons are further justifications in support of prison restrictions on the right to procreate during incarceration.<sup>337</sup> Prisons have claimed a legitimate interest in avoiding the unacceptable risk of litigation arising from a mishandling of male inmates’ semen samples or litigation by women seeking to be artificially inseminated.<sup>338</sup>

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328. *Id.*

329. *Id.* at 1400.

330. *Id.* at 1399.

331. *Turner v. Safley*, 482 U.S. 78, 97 (1987). For a more in-depth discussion of security interests as a legitimate governmental objective offered to justify prison regulations on inmates’ right to procreate, see *supra* notes 274-280 and accompanying text.

332. *Gerber v. Hickman*, 264 F.3d 882, 890 (9th Cir. 2001).

333. See *Goodwin*, 908 F.2d at 1398-99.

334. See *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 336 (3d Cir. 1987) (asserting governmental interests as justifications for abortion prohibition were insurmountable administrative and financial burdens).

335. See *supra* notes 328-329 and accompanying text.

336. See *DeOliveira*, *supra* note 115, at 210.

337. *Gerber*, 264 F.3d at 891.

338. *Id.*

ii. *Factor 2: Whether Alternative Means of Exercising the Right Remain Open to Prison Inmates*

This second factor requires an inquiry into whether “other avenues”<sup>339</sup> remain open to inmates for the exercise of the asserted right. If so, courts must employ the proper “judicial deference owed to corrections officials” in gauging the validity of a prison regulation.<sup>340</sup> The existence of other means of exercising the asserted right is evidence of the reasonableness of a prison regulation.<sup>341</sup> Nonetheless, the Eighth Circuit upheld a prison regulation on the right to procreate as reasonable even though no alternative means existed for a prisoner to exercise the right.<sup>342</sup> The court’s reasoning was that no alternatives can exist without compromising prison policy or consuming a large amount of prison resources to similarly accommodate the requests of female inmates to exercise their right to procreate.<sup>343</sup> Thus, the court found the lack of ready alternatives as evidence of the reasonableness of the prison policy.<sup>344</sup>

iii. *Factor 3: What Impact Accommodation of the Asserted Constitutional Right Will Have on Guards, Other Inmates, and Prison Resources*

One argument is that accommodating an inmate’s fundamental right to procreate would have a significant impact on other inmates.<sup>345</sup> For example, it would force prisons to grant female prisoners expanded medical services to accommodate their right to procreate. This would, in turn, remove resources necessary for security and other legitimate penological interests.<sup>346</sup> This is exactly the sort of ripple effect on the prison system to which the *Turner* Court referred.<sup>347</sup> As a result, courts should be “particularly deferential to the informed discretion of corrections officials,”<sup>348</sup> as required by *Turner*, and find that prison restrictions on inmate

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339. *Turner v. Safley*, 482 U.S. 78, 90 (1987) (citing *Jones v. N. C. Prisoners’ Union*, 433 U.S. 119, 131 (1977)).

340. *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

341. *See id.* at 92.

342. *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).



procreation are reasonably related to legitimate penological objectives.<sup>349</sup>

Furthermore, accommodating a male inmate's right to procreate would impose a greater burden on the prison system's limited resources than already exists<sup>350</sup> in such a way, for example, that accommodating a female inmate's request for a nontherapeutic abortion<sup>351</sup> would not.<sup>352</sup> Prisons already provide means to perform medically necessary abortions on female inmates,<sup>353</sup> as well as means for carrying a fetus to term.<sup>354</sup> Therefore, providing nontherapeutic abortions to female inmates imposes no greater burdens on the prison system than already exist.<sup>355</sup> To the contrary, suddenly granting male inmates the right to procreate by artificial insemination would require prisons to effectuate new procedures to collect and handle semen samples.<sup>356</sup> These procedures would inevitably impose significant new burdens on prison resources.<sup>357</sup> Moreover, a perceived favoritism<sup>358</sup> may result where special arrangements are made to accommodate male prisoners. In *O'Lone v. Estate of Shabazz*, the Supreme Court found such favoritism adequate enough to deny a prisoner the right to special religious accommodations.<sup>359</sup>

In sum, it is argued that prison restrictions on an asserted right are reasonably justified if the exercise of that right may "threaten the core functions of prison administration, maintaining safety and internal security."<sup>360</sup> If the exercise of a disputed right is possible only at the cost of significantly less liberty and safety for guards and other prisoners, then the "potential 'ripple effect' is even

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349. *Id.*

350. *See supra* note 346 and accompanying text.

351. Nontherapeutic abortions are defined as elective, or not necessary to protect the life or health of the mother, whereas medically necessary abortions are in fact necessary to preserve a woman's life or health. *See Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 330 n.7, 331 (3d Cir. 1987).

352. *See id.* at 341-42.

353. *See id.* at 334.

354. *See id.* at 342.

355. *See id.* at 341-42 (finding that providing an inmate electing to have a nontherapeutic abortion with transportation to a medical facility and the necessary funding for the procedure will not burden the prison's limited resources and may in fact impose less administrative and financial burdens than inmates opting for childbirth).

356. *See Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990).

357. *See id.* at 1398-99.

358. *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 342 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987)).

359. *O'Lone*, 482 U.S. at 342.

360. *See Turner v. Safley*, 482 U.S. 78, 92 (1987).

broader.”<sup>361</sup> The Supreme Court has held that, “Where the exercise of a right requires this kind of tradeoff . . . the choice made by corrections officials — which is, after all, a judgment ‘peculiarly within [their] province and professional expertise,’ — should not be lightly set aside by the courts.”<sup>362</sup>

iv. *Factor 4: Whether the Absence of Ready Alternatives Is Evidence of the Reasonableness of a Prison Regulation*

The Supreme Court has explained this fourth factor in greater depth by stating that the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an “exaggerated response” to prison concerns.<sup>363</sup> For example, in *Goodwin*, the Eighth Circuit held that a lack of ready alternatives for accommodating a male prisoner’s right to procreate evidenced the reasonableness of the prison policy restricting his right to procreate.<sup>364</sup> Besides artificial insemination, the court found the only other ready alternative for the inmate to exercise his right was upon release from prison.<sup>365</sup> The fact that no prison system in the United States has accommodated an inmate’s request to procreate,<sup>366</sup> due to the significant conflicts with legitimate penological objectives such as institutional order and security,<sup>367</sup> supports the assertion that no ready alternatives to inmate procreation exist at a de minimis cost to the prison system.<sup>368</sup>

b. *Prison Regulations Restricting Prisoners’ Fundamental Right to Procreate Are Not Reasonably Related to Legitimate Penological Interests*

i. *Factor 1: Whether a Valid, Rational Connection Exists Between the Prison Regulation and the Legitimate Governmental Interest Put Forward to Justify It*

Not every court has found a rational connection between prison regulations that restrict inmates’ right to procreate and the peno-

361. *Id.*

362. *Id.* at 92-93 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

363. *Id.* at 90. For a further discussion of the fourth *Turner* factor, see *supra* note 120 and accompanying text.

364. *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

365. *Id.*

366. See *Davis*, *supra* note 3, at 191 (all fifty states deny conjugal visits to death row inmates).

367. See *Turner*, 482 U.S. at 93; *Goodwin*, 908 F.2d at 1400.

368. See *Goodwin*, 908 F.2d at 1400.

logical interests offered to justify these restrictions.<sup>369</sup> For instance, the Ninth Circuit, in *Gerber*, was not persuaded by any of the governmental interests put forth to justify the policy of denying inmates the right to procreate through artificial insemination.<sup>370</sup> First, the court rejected the government's argument that equal protection of male and female prisoners is a legitimate interest justifying prison restrictions on the right to procreate,<sup>371</sup> finding that males and females in prison are not similarly situated.<sup>372</sup> In its equal protection jurisprudence, the Supreme Court has acknowledged the "basic biological differences" between the sexes, as well as the fact that, "The difference between men and women in relation to the birth process is a real one."<sup>373</sup> In light of that, prisoners argue that prison administrators should not ignore the biological differences between men and women.<sup>374</sup> Courts have generally found that the narrow right to provide semen to artificially inseminate one's spouse does not apply to female inmates and, therefore, the policy of treating male and female inmates equally is not implicated in this context.<sup>375</sup>

Courts have also rejected the argument that security objectives are reasonable justifications for prison regulations that restrict prisoners' ability to exercise the right to procreate during incarceration.<sup>376</sup> The Ninth Circuit has, for example, discounted "gassing"<sup>377</sup> and other concerns regarding the misuse of semen,<sup>378</sup> as security risks inherent in permitting male inmates the ability to procreate through artificial means.<sup>379</sup> The court noted that male inmates are capable of collecting their own semen samples, or paying for pro-

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369. See *Gerber v. Hickman*, 264 F.3d 882, 892 (9th Cir. 2001).

370. *Id.* at 890. For a further discussion, see *supra* notes 173-179 and accompanying text.

371. *Gerber*, 264 F.3d at 891.

372. See *id.*; see also *Goodwin*, 908 F.2d at 1400 (McMillian, J., dissenting) (stating that equal treatment of inmates is not a legitimate interest when it is accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right).

373. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

374. See *Gerber*, 264 F.3d at 891. For a further discussion of the equal protection concerns regarding male and female inmates' procreative differences, see *supra* notes 296-299 and accompanying text.

375. See *Gerber*, 264 F.3d at 891; see also *Goodwin*, 908 F.2d at 1406 (McMillian, J., dissenting) (stating that equal treatment is not rationally furthered by denying all inmates a constitutional right simply because it might be legitimately denied to some).

376. See *Gerber*, 264 F.3d at 891.

377. See *supra* note 276 and accompanying text.

378. *Gerber*, 264 F.3d at 891.

379. *Id.*

fessional medical supervision of the collection procedure. Furthermore, they can arrange for their own private party to receive the specimen directly from the prison.<sup>380</sup> Therefore, the court concluded that any increased safety or security costs from allowing inmates to procreate, specifically male inmates who wish to provide semen for artificial insemination purposes, were not proven to be overly burdensome on the prison system so as to justify prohibition.<sup>381</sup>

Lastly, some courts have rejected the fear of liability as a legitimate penological concern<sup>382</sup> for justifying prison restrictions on the right to procreate.<sup>383</sup> The *Gerber* court found this argument “reprehensible” and held that it is impermissible to restrict the constitutional rights of one group for fear that another may exercise its constitutional rights.<sup>384</sup> In fact, the court was astounded by the mere suggestion that restricting constitutionally protected rights may be justified by the fear of increasing a party’s liability.<sup>385</sup> Even the Eighth Circuit, in *Goodwin*, rejected the alleged penological interest of avoiding tort liability as “irrelevant”<sup>386</sup> and “far-fetched.”<sup>387</sup>

ii. *Factor 2: Whether Alternative Means of Exercising the Right Remain Open to Prison Inmates*<sup>388</sup>

Some have argued that a prisoner has no alternative means of exercising the right to procreate while incarcerated,<sup>389</sup> other than during conjugal visits, which all fifty states have denied to prisoners<sup>390</sup> or upon release from prison.<sup>391</sup> This argument concludes that

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380. *Id.*

381. *Id.* at 893 n.14.

382. *See supra* notes 337-338 and accompanying text.

383. *See Gerber*, 264 F.3d at 891-92.

384. *Id.* at 891.

385. *Id.* at 891-92.

386. *Goodwin v. Turner*, 908 F.2d 1395, 1400 n.7 (8th Cir. 1990) (finding tort liability “irrelevant” because inmate and spouse can sign a waiver releasing the prison from all potential tort liability).

387. *Id.* (stating that even absent a waiver, grounds for tort liability would be “far-fetched”).

388. *Turner v. Safley*, 482 U.S. 78, 90 (1987). For a further discussion of the second *Turner* factor, see *supra* note 118 and accompanying text.

389. *See Goodwin*, 908 F.2d at 1400; *id.* at 1405 (McMillian, J., dissenting).

390. *See Davis*, *supra* note 3, at 191 (stating that all fifty states deny conjugal visits to death row inmates for security reasons); *see also Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (holding prisoners have no constitutional right to conjugal visits).

391. *See Goodwin*, 908 F.2d at 1400.

the total deprivation of the right to procreate causes severe injuries to inmates by totally denying them the ability to exercise their asserted right,<sup>392</sup> as well as causing equally harsh effects on the constitutional rights of unincarcerated spouses.<sup>393</sup> As a result, the lack of alternative means for inmates to exercise the right to procreate has been said to exemplify the unreasonableness of prison restrictions on that right.<sup>394</sup>

iii. *Factor 3: What Impact Accommodation of the Asserted Constitutional Right Will Have on Guards, Other Inmates, and Prison Resources*

One view is that the right to procreate while incarcerated, at least for male inmates, can be accommodated at a negligible cost to prison security, administration, and allocation of resources.<sup>395</sup> This argument contends that a prison need only provide an inmate with a clean container in which to deposit his semen and allow the container to be transported to his spouse.<sup>396</sup> The container need not even be sterile, and prisoners may pay whatever expenses are incurred during the process.<sup>397</sup> Proponents of this view argue that accommodating the right to procreate is a de minimis cost for prisons.<sup>398</sup>

Another viewpoint is that it is improper to base accommodating male inmates' requests to procreate via artificial insemination on the rights of female inmates.<sup>399</sup> Judge McMillian, for example, criticized the Eighth Circuit majority for considering a hypothetical scenario not before the court.<sup>400</sup> Because no female inmates have yet to attempt to exercise their fundamental right to procreate while incarcerated, courts should not give any weight to the concern for additional administrative and financial burdens as a result of accommodating female inmates.<sup>401</sup> Judge McMillian argued that this supposed "ripple effect" of accommodating female inmates

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392. *Id.* at 1405 (McMillian, J., dissenting).

393. *See id.* at 1406 n.6 (McMillian, J., dissenting). For a further discussion of the effects of prison regulations that restrict inmates' right to procreate on unincarcerated spouses, see *supra* notes 261-264 and accompanying text.

394. *See Goodwin*, 908 F.2d at 1405-06 (McMillian, J., dissenting).

395. *See id.* at 1406 (McMillian, J., dissenting).

396. *See id.* (McMillian, J., dissenting).

397. *See id.* (McMillian, J., dissenting).

398. *See id.* (McMillian, J., dissenting).

399. *See id.* (McMillian, J., dissenting).

400. *Id.* (McMillian, J., dissenting).

401. *See id.* (McMillian, J., dissenting).

was not before the court in *Goodwin*.<sup>402</sup> The judge cited *Turner* as requiring courts to consider whether accommodation of the “*asserted right* will have a significant ‘ripple effect’” on prison administration.<sup>403</sup> Judge McMillian pointed out that a different case will be presented when a female inmate requests to exercise her right to procreate and bear a child in prison.<sup>404</sup> Only in such a case, may concern for the additional medical, financial, and administrative burdens justify a denial of the request.<sup>405</sup>

iv. *Factor 4: Whether the Absence of Ready Alternatives Is Evidence of the Reasonableness of a Prison Regulation*

Some argue that because alternatives to complete prohibitions on inmates’ right to procreate exist, such restrictions are unreasonable.<sup>406</sup> One alternative, pertaining to male inmates’ right to procreate through artificial means, is that prison administrators should make decisions on such requests on a case-by-case basis.<sup>407</sup> Rather than have a blanket prohibition on prisoner procreation, prison administrators should deny a prisoner’s assertion of the right to procreate only if that particular request would unduly burden the prison, or require a significant expenditure of resources.<sup>408</sup> A second alternative could be the adoption of a policy permitting artificial insemination only if accommodation of the request will cause no significant burden on prison security, administration, and allocation of resources.<sup>409</sup> This alternative to a total restriction on inmate procreation would accommodate a prisoner’s right to procreate at de minimis cost to legitimate penological interests.<sup>410</sup> The availability of two ready alternatives to prison regulations totally prohibiting prisoner procreation is evidence that the regulations are an “exaggerated response” to prison concerns,<sup>411</sup> and therefore, not “reasonably related to legitimate penological interests.”<sup>412</sup>

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402. *Id.* at 1406 n.7 (McMillian, J., dissenting).

403. *Id.* (McMillian, J., dissenting).

404. *Id.* at 1406 (McMillian, J., dissenting).

405. *Id.* (McMillian, J., dissenting).

406. *See id.* (McMillian, J., dissenting).

407. *Id.* (McMillian, J., dissenting).

408. *Id.* (McMillian, J., dissenting).

409. *Id.* at 1407 (McMillian, J., dissenting).

410. *See id.*

411. *See id.* (citing *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

412. *See id.* (citing *Turner*, 482 U.S. at 89).

### C. Public Policy Issues Regarding Prisoner Procreation

#### 1. *An Argument Against Prisoners' Procreative Freedom: Contributing to the So-Called "Single-Parent Epidemic"*<sup>413</sup>

An argument against permitting prisoners some form of procreative means while incarcerated is a reluctance to needlessly contribute to a growing societal concern, the single-parent family.<sup>414</sup> While some prisoners will eventually be released and join their respective spouses and infants, others will serve the remainder of their lives behind bars. This will result in an even greater strain on society and government resources, as single-parent families' income is only forty percent of the average income for two-parent families.<sup>415</sup> Prison is the punishment for an injury to society, the argument goes, and society should not bear the costs of subsidizing single-parent families created by allowing prisoners to procreate with unincarcerated spouses.

Other societal burdens include the classic argument that increased likelihood that children raised in single-parent families are more likely to have trouble in school and to be involved in juvenile crime.<sup>416</sup> Furthermore, children of incarcerated parents generally experience a multitude of negative emotional and psychological behaviors, including anxiety, depression, anger, loneliness, guilt, low self-esteem, and emotional withdrawal from friends and family.<sup>417</sup> Therefore, the dire consequences on society from allowing prisoners the right to procreate arguably justify a total restriction on the right during incarceration.

#### 2. *An Argument in Support of Prisoners' Procreative Freedom: Form of Effective Rehabilitation*

An argument in favor of allowing inmates some means to procreate while incarcerated is that procreation may facilitate the fur-

413. See generally Haeryon Kim, Book Note, *In Defense of Single-Parent Families*, 2 J.L. FAM. STUD. 229 (2000).

414. "Single-parent families now constitute 30 percent of all families with minor children and are the most rapidly growing family form in America." Kim, *supra* note 413, at 229 (quoting NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* 5 (1997)).

415. *Id.* at 231.

416. See, e.g., Editorial, *Good News and Bad About Families*, CHI. TRIB., June 7, 1998, at C22.

417. See, e.g., Rachel Sims, Note, *Can My Daddy Hug Me?: Deciding Whether Visiting Dad in a Prison Facility is in the Best Interest of the Child*, 66 BROOKLYN L. REV. 933, 945-46 (2000-01).

therance of the important correctional goal of rehabilitation.<sup>418</sup> While incarcerated, prisoners often face problems of low self-esteem and ego degradation, which in turn lead to feelings of inadequacy, helplessness, and worthlessness.<sup>419</sup> To combat these problems, prison administrators should encourage programs or methods that promote positive, effective rehabilitation.<sup>420</sup> Allowing prisoners to procreate may help to strengthen bonds between prisoners and loved ones, and provide incentive for prisoners to effectively rehabilitate, so that they may eventually fully enjoy the experience of parenthood.<sup>421</sup> A derivative result of providing this kind of incentive is a reduction in the recidivism rate. If prisoners are given hope to strive for, in the form of a child cut from their own flesh and blood, then they are more likely to rehabilitate while in prison, and less likely to repeat past criminal behavior.<sup>422</sup> Therefore, as a result of allowing inmates some form of procreation, two important penological goals, rehabilitation and deterrence, are arguably positively promoted.<sup>423</sup>

### III. THE RIGHT TO PROCREATE SHOULD EXTEND TO PRISONERS

#### A. Procreative Rights Should Survive Incarceration

Though no circuit court has endorsed any of the district court holdings that the right to procreate does not survive incarceration,<sup>424</sup> some appellate courts have not given the issue fair treatment. They have merely dodged the issue of whether procreative

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418. See DeOliveira, *supra* note 115, at 206.

419. *Id.*

420. *Id.*

421. *Id.* at 207; see also Sims, *supra* note 417, at 943 (maintaining close family ties during incarceration results in decreased recidivism rates, increased likelihood of family reunification, and greater potential for success for the parolee).

422. See DeOliveira, *supra* note 115, at 207

423. See *id.* at 206.

424. *E.g.*, Gerber v. Hickman, 103 F. Supp. 2d 1214, 1218 (E.D. Cal. 2000) (“Whatever right plaintiff has to artificial insemination, it does not survive incarceration.”), *rev’d*, 264 F.3d 882 (9th Cir. 2001) (right to procreate survives incarceration); Anderson v. Vasquez, 827 F. Supp. 617, 620 (“‘fundamental right’ to procreate . . . does not survive incarceration”), *aff’d in part, rev’d in part on other grounds*, 28 F.3d 104 (9th Cir. 1994) (unpublished mem. disposition) (issue of right to procreate in prison not ripe for adjudication); Goodwin v. Turner, 702 F. Supp. 1452, 1455 (D. Mo. 1988) (prisoners’ right to procreate is “fundamentally inconsistent with imprisonment itself”), *aff’d in part on other grounds*, 908 F.2d 1395 (8th Cir. 1990) (assuming, but not deciding, that the right to procreate survives incarceration and affirming on the basis that legitimate penological interests justified restriction of the right). For a further discussion of the Ninth Circuit’s decision in Gerber, see *supra* Part I.D.2.



rights survive incarceration. Some courts have gone as far as to fabricate "legitimate penological objectives" as a means to escape having to take a stance on the issue. For example, the Eighth Circuit chose to wholly avoid deciding the issue by assuming that the right to procreate survives incarceration, and then finding that legitimate penological interests justified restriction of the right.<sup>425</sup> Similarly, a New Jersey appellate court danced around the issue, holding that, even if a prisoner has a fundamental right to procreate while serving a prison sentence, sufficient, valid penological concerns justify a restriction on that right.<sup>426</sup>

The Ninth Circuit alone has correctly held that the right of procreation survives incarceration.<sup>427</sup> The right to procreate, "fundamental to the very existence and survival of the [human] race,"<sup>428</sup> must survive incarceration.

### 1. *Skinner Requires Survival of Procreative Rights upon Incarceration*

The Supreme Court, in *Skinner*, held that prisoners have a constitutional right to retain their procreative abilities for use after being released from prison.<sup>429</sup> This holding implicitly recognizes that the right to procreate survives incarceration. The Court decisively declared, "procreation [is] fundamental to the very existence and survival of the race,"<sup>430</sup> while expressing grave reservations about entrusting the state with the power to sterilize out of fear for the possible "far reaching and devastating effects."<sup>431</sup> Because *Skinner* preserves an incarcerated prisoner's biological capacity to procreate for use upon release, then it must follow that the right to procreate survives incarceration.<sup>432</sup> Moreover, the Third Circuit

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425. *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990). For a further discussion of the Eighth Circuit's decision in *Goodwin*, see *supra* Part I.D.1.

426. *Percy v. State Dep't of Corr.*, 651 A.2d 1044, 1047 (N.J. Super. Ct. App. Div. 1995). Although the court did not expressly declare that the right to procreate does not survive incarceration, it heavily insinuated as much, declaring that, "no court in the land has upheld the constitutional right of an inmate to procreate through artificial insemination." *Id.* at 1045. In support of the notion that procreative rights do not survive incarceration, the court cited *Goodwin* as "squarely declin[ing] to recognize such a right." *Id.*

427. *Gerber*, 264 F.3d at 890.

428. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). For more on *Skinner*, see *supra* notes 65-69 and accompanying text.

429. *Skinner*, 316 U.S. at 536.

430. *Id.* at 541.

431. *Id.*

432. For more on this persuasive argument and others raised by Judge McMillian, dissenting in *Goodwin*, see *supra* notes 205-214 and accompanying text.

interpreted *Skinner* as including the right to procreate among the significant rights of privacy that the Supreme Court has found to survive incarceration.<sup>433</sup>

Furthermore, the idea that *Skinner* supports the notion that denying the right to procreate in prison is not a constitutional violation because it only delays the exercise of that right until release is preposterous.<sup>434</sup> There is no basis for distinguishing *Skinner* from the current issue simply because *Skinner* involved a permanent deprivation of the means to procreate, whereas denying inmates the right to procreate may only delay their exercise of the right until release, in some cases.<sup>435</sup> The concern for the "devastating effects" of sterilization in *Skinner*<sup>436</sup> is just as potent in cases where the government denies the existence of the right to procreate upon incarceration. Although prisoners who are released from incarceration may finally and freely exercise their right to procreate,<sup>437</sup> inmates sentenced to live their entire lives inside a prison, and eventually die therein, will never again have the opportunity to have children. For these individuals, imprisonment is not merely a "delay" in the exercise of their fundamental right to procreate;<sup>438</sup> it is the equivalent of state-sponsored sterilization, which the Constitution forbids.<sup>439</sup>

## 2. *Turner Strongly Suggests Survival of Procreative Rights upon Incarceration*

In *Turner*, the Supreme Court recognized that the decision to marry is a fundamental right for nonprisoners and reiterated that an inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."<sup>440</sup> Consequently, the

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433. *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987) (relating the right to abortion to other significant privacy rights that the Supreme Court has found to survive incarceration, including the right to procreate and the right to marry).

434. *E.g.*, *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (D. Mo. 1988). For Judge McMillian's dissenting rebuke to this idea, see *supra* notes 207-208 and accompanying text.

435. *See Goodwin*, 702 F. Supp. at 1454.

436. For a discussion of *Skinner*, see *supra* notes 65-69 and accompanying text.

437. *See Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

438. *See id.*

439. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

440. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

Court held that the right to marry survives incarceration.<sup>441</sup> At the same time, though, the Court acknowledged that “the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration.”<sup>442</sup> One court has interpreted this statement as supporting the argument against the survival of the right to procreate upon incarceration.<sup>443</sup> However, such a conclusion is at complete odds with the holding in *Turner*. Even though the *Turner* Court acknowledged that the right to marry is subject to substantial restrictions as a result of incarceration, it nonetheless held that the right survived incarceration.<sup>444</sup> The prison administrators in *Turner*, like prison administrators in the procreation context,<sup>445</sup> argued that different rules should apply in a prison setting with respect to fundamental rights.<sup>446</sup> The Court rejected this argument and held that the constitutional protections for the fundamental right to marry also applied to prison inmates.<sup>447</sup> The Court found that many important attributes of marriage remain to form a constitutionally protected marital relationship in the prison context.<sup>448</sup>

The leap from the Court’s holding in *Turner* to a similar result regarding prisoners’ right to procreate is not a long one. Just as the bedrock principles of *Zablocki* applied to protect the survival of the fundamental right to marry for inmates in *Turner*,<sup>449</sup> the right to procreate, “fundamental to the very existence and survival of the [human] race,”<sup>450</sup> protected in landmark cases such as *Skinner*, *Stanley*, and *Casey*,<sup>451</sup> should survive incarceration and apply to prisoners. Furthermore, although the *Turner* Court did not include the right to procreate among the attributes important in forming a constitutionally protected marital relationship in the prison con-

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441. *Id.* at 96.

442. *Id.* at 95.

443. *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (D. Mo. 1988).

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

445. *See Gerber v. Hickman*, 264 F.3d 882, 885 (9th Cir. 2001).

446. *Turner*, 482 U.S. at 94-95.

447. *Id.* at 95 (holding that the Court’s ruling in *Zablocki v. Redhail*, 434 U.S. 374 (1978), protecting the constitutional right to marry for nonprisoners, applies to inmates).

448. *Id.* at 96.

449. *Id.* at 95 (citing *Zablocki*, 434 U.S. at 374 and *Loving v. Virginia*, 388 U.S. 1 (1967)).

450. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

451. For a discussion of the Supreme Court’s holdings in *Skinner*, *Stanley*, and *Casey*, see *supra* notes 27-32 and accompanying text.

text,<sup>452</sup> it did not expressly state that the right to procreate does not survive incarceration. Rather, the Court merely pointed out that, “[M]ost inmate marriages . . . ultimately will be fully consummated [in the future].”<sup>453</sup> This language suggests that the right to marital intimacy, through conjugal visits for example,<sup>454</sup> does not survive incarceration. However, it does not foreclose the possibility that a broader right to procreate survives incarceration.<sup>455</sup> Just as the *Turner* Court found that certain elements of marriage survive incarceration, while others do not,<sup>456</sup> the same can be said regarding the right to procreate. The right to procreate for prisoners through direct sexual intercourse with their spouse may pose too great a security risk to survive incarceration,<sup>457</sup> but the right to procreate through alternative means, such as artificial insemination, is “not inconsistent with [the] status [of] a prisoner,”<sup>458</sup> and should, therefore, survive incarceration.

### 3. *Skinner and Turner, Combined, Necessitate the Survival of Procreative Rights upon Incarceration*

Taken together, *Turner* and *Skinner* mandate that procreation is a fundamental right that survives incarceration.<sup>459</sup> This is true even though an inmate will not necessarily be able to exercise that right in the same manner or to the same extent as he would if he were not incarcerated.<sup>460</sup> *Skinner* states that, at the very least, the state cannot permanently deprive an inmate of his ability to procreate upon release.<sup>461</sup> This proposition lends strong support to the notion that some form of a person’s right to procreate survives while he is incarcerated.<sup>462</sup> *Turner* is an example of how a right related to

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452. *Turner*, 482 U.S. at 95-96; see *Percy v. State Dep’t of Corr.*, 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div. 1995). For a further discussion, see *supra* notes 246-247 and accompanying text.

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

454. See *Hernandez v. Coughlin*, 18 F.3d 133, 136-37 (2d Cir. 1994) (holding that there is no constitutional right to conjugal visits for inmates).

455. See *Gerber v. Hickman*, 264 F.3d 882, 889 (9th Cir. 2001).

456. *Turner*, 482 U.S. at 95-96.

457. See *Hernandez*, 18 F.3d at 133.

458. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (stating that a prison inmate “retains those [constitutional] rights that are not inconsistent with his status as a prisoner”).

459. *Gerber*, 264 F.3d at 889; *Goodwin v. Turner*, 908 F.2d 1395, 1402-03 (8th Cir. 1990) (McMillian, J., dissenting).

460. *Gerber*, 264 F.3d at 889.

461. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

462. *Gerber*, 264 F.3d at 889. For a further discussion of how *Skinner* supports the idea that procreative rights survive incarceration, see *supra* Part III.A.1.

family and marriage may be exercised in prison despite a prisoner's inability to carry out the "typical" marriage while in prison.<sup>463</sup> Despite the fact that it is possible to have procreation without marriage, and marriage without procreation, special emphasis is placed on procreation within the marital relationship as a stabilizing force in our society.<sup>464</sup> Due to its fundamental nature and importance to the marital relationship, the right to procreate, like the right to marry, must survive incarceration.<sup>465</sup>

4. *Nonsurvival of Right to Conjugal Visitation Does Not Foreclose Survival of Procreative Rights upon Incarceration*

Recognizing a general right to procreate during imprisonment is not inconsistent with a holding that there is no right to conjugal visits in prison.<sup>466</sup> In a case involving a prisoner's right to conjugal visits, the Second Circuit held that prisoners have no fundamental right to conjugal visits.<sup>467</sup> However, the court drew a distinction between the right to intimate marital relations while incarcerated and the fundamental rights of marriage and procreation.<sup>468</sup> The court disagreed that a constitutionally protected, fundamental right to conjugal visits derived from the fundamental rights of marriage and procreation.<sup>469</sup> The majority even criticized the prisoner-claimant for misunderstanding the distinction.<sup>470</sup> In doing so, the court recognized that prisoners have a fundamental right to marry and to maintain their procreative abilities, though these rights are restricted as a result of incarceration.<sup>471</sup> The court then asserted that, "The Constitution, however, does not create any protected guarantee to conjugal visitation privileges while incarcerated."<sup>472</sup> This language, and line of reasoning, suggests that the court recognized that a prisoner's rights to marry and procreate survive incarceration. However, the exercise of these rights is subject to restriction and does not necessarily create a fundamental right to conjugal visitation while incarcerated.

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463. *Gerber*, 264 F.3d at 889.

464. *Goodwin*, 908 F.2d at 1402 (McMillian, J., dissenting).

465. *Id.* (McMillian, J., dissenting).

466. *Gerber*, 264 F.3d at 882, 890.

467. See *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994). For a discussion of this case, see *supra* notes 91-96 and accompanying text.

468. *Hernandez*, 18 F.3d at 136.

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.* at 137.

Furthermore, the opinion's language suggests that the Second Circuit intended to reject only the narrow right to conjugal visitation for prisoners, without denying the possibility that a broader right of procreation survives incarceration.<sup>473</sup> The court found that important prison interests precluded a prisoner "from retaining a fundamental right to cohabit with his or her spouse."<sup>474</sup> The court framed its holding so as to reject only the specific right to intimate marital relations while incarcerated.<sup>475</sup> The court did not, however, make broad assertions about the right to procreate in general. Like the *Turner* Court, the court stated, "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting."<sup>476</sup> This statement suggests that the right to procreate, like the right to marry, survives incarceration, but exercising the right can be restricted in favor of legitimate penological objectives.<sup>477</sup>

Intercourse and procreation are two entirely separate acts. With the help of modern medicine, married persons can have a child without actual intercourse.<sup>478</sup> Therefore, a finding that the right to marital intimacy does not survive incarceration should have no bearing whatsoever on the issue of whether the right to procreate survives incarceration. We should not confuse the two and neither should the courts.

##### 5. *In Sum: The Right to Procreate Should Survive Incarceration*

In keeping true to the Supreme Court's jurisprudence regarding fundamental privacy rights that deserve constitutional protection in a prison setting,<sup>479</sup> the fundamental right to procreate must be recognized to survive incarceration. A prisoner's right to procreate is "not inconsistent with his status as a prisoner."<sup>480</sup> Holding otherwise would constructively result in state-sponsored sterilization of

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473. See *Gerber v. Hickman*, 264 F.3d 882, 889 (9th Cir. 2001).

474. *Hernandez*, 18 F.3d at 137.

475. *Id.* ("[T]he right to marital privacy and conjugal visits while incarcerated is not [constitutionally protected for inmates.]").

476. *Id.*

477. See *Gerber*, 264 F.3d at 889.

478. See generally *id.* at 884, 890 (citing Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 202 (1997) (noting a conservative estimate that there have been more than 500,000 children conceived by artificial insemination in the United States)).

479. See *supra* notes 52-83 and accompanying text.

480. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (stating that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner").

inmates during incarceration.<sup>481</sup> Although such a holding may not significantly burden the fundamental rights of prisoners who will eventually be released,<sup>482</sup> it has the actual effect of permanently depriving life-term inmates of their fundamental right to choose to conceive a child.<sup>483</sup> “Like the rights to marry, to be free of compulsory sterilization, and to choose to terminate a pregnancy, the right to procreation is within that cluster of constitutionally protected choices that survives incarceration.”<sup>484</sup>

### **B. Conclusions Regarding the Proper Constitutional Standard of Review in Prisoners’ Procreative Rights Cases**

For the purposes of further discussion and analysis of the issues, the remainder of this Note assumes that the right to procreate survives incarceration. If the right to procreate survives incarceration, the next issue is whether the government can justifiably restrict the exercise of that fundamental right without infringing upon a prisoner’s constitutional rights.<sup>485</sup> This issue requires a determination and application of the proper constitutional standard of review.<sup>486</sup> A thorough analysis of government regulations that restrict a prisoner’s ability to exercise the right to procreate inevitably raises concerns about third-party spouses and whether their constitutional rights are violated by such regulations.<sup>487</sup>

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481. See *Goodwin v. Turner*, 908 F.2d 1395, 1402-03 (8th Cir. 1990) (McMillian, J., dissenting) (“The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects.”) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

482. As discussed at length in this Note, the state cannot permanently deprive an inmate of his ability to procreate upon release. *Skinner*, 316 U.S. at 536. For further discussion, see *supra* notes 65-69 and accompanying text.

483. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The rights to conceive . . . one’s children have been deemed ‘essential’ . . . [and] ‘basic civil rights of man.’”); see also *Carey v. Population Services Int’l*, 431 U.S. 678, 685 (1977).

484. *Goodwin*, 908 F.2d at 1403 (McMillian, J., dissenting) (citing *Carey*, 431 U.S. at 685).

485. See *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); see also *Gerber v. Hickman*, 264 F.3d 882, 887 (9th Cir. 2001).

486. See *Goodwin*, 908 F.2d at 1398. For a further discussion on the constitutional standard of review for regulations that infringe on prisoners’ rights, see *supra* Part I.C.1.

487. See generally *Goodwin*, 908 F.2d at 1400-01 (McMillian, J., dissenting). For a further discussion on the constitutional standard of review for prison regulations that infringe on nonprisoners’ rights, see *supra* Part I.C.2.

1. *Third-Party Constitutional Rights Implicated by Prison Regulations Restricting Inmates' Fundamental Right to Procreate Requires Application of the Martinez Heightened Scrutiny Standard of Review*

It is universally accepted that imprisonment deprives a spouse of certain privacy and marital rights, such as the constitutional right to freedom of association. But, as discussed above, an unincarcerated spouse's deprivation of the right to freedom of association is generally not absolute.<sup>488</sup> However, a wife's fundamental right to procreate is completely extinguished by a prison regulation that denies her husband the ability to procreate while incarcerated, at least until he is released.<sup>489</sup> Far more devastating is the scenario where the husband is a life-term prisoner, because the wife may never have the opportunity to exercise her constitutional right to procreate within a marital relationship. These terribly harsh consequences on civilian-spouses are the realities of permitting prison restrictions on inmates' fundamental right to procreate while incarcerated.

In the interest of protecting the constitutional rights equally guaranteed to every citizen, courts must apply the more stringent *Martinez* standard over the less burdensome *Turner* test when prison regulations implicate the rights of nonprisoners. Even the Supreme Court, in *Turner*, noted that a regulation implicating the interests of nonprisoners "may support application of the *Martinez* standard, because the regulation may entail a 'consequential restriction on the [constitutional] rights of those who are not prisoners.'"<sup>490</sup>

Moreover, a broad reading of *Martinez*, as it applies to regulations restricting the outgoing correspondence of inmates,<sup>491</sup> sup-

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488. *Goodwin*, 908 F.2d at 1406 n.6 (McMillian, J., dissenting). For a further discussion, see *supra* notes 261-264 and accompanying text.

489. *Id.* (McMillian, J., dissenting).

490. *Turner*, 482 U.S. at 97 (quoting *Procnier v. Martinez*, 416 U.S. 396, 409 (1974)). However, the Court did not reach this question because it found that the marriage regulation failed even the less demanding *Turner* reasonable relationship test. *Id.* For a further discussion, see *supra* note 113.

491. In *Thornburgh*, the Supreme Court explicitly overruled *Martinez* as the applicable standard for incoming correspondence, even correspondence from nonprisoners. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). However, the Court noted that *Martinez* continued to apply to regulations restricting outgoing correspondence. *Id.* Rather than retaining *Martinez* for outgoing correspondence out of concern for the burdened rights of civilians, the Court specifically stated that the *Martinez* Court invalidated the challenged regulation because outgoing correspondence did not, by its very nature, impose a substantial threat to prison security. See Davis, *supra* note 3, at 184 (citing *Thornburgh*, 490 U.S. at 411). The *Thornburgh* Court refused to create different standards for prisoner and nonprisoner rights cases.



ports, at least, its application to cases involving a prisoner's request to exercise his right to procreate by artificially inseminating his non-prisoner spouse. The Supreme Court has held that outgoing inmate correspondence presents no substantial threat to prison security.<sup>492</sup> Outgoing inmate semen specimens are analogous to outgoing inmate correspondence. Although procuring a semen specimen is procedurally more complicated than providing a prisoner with pen and paper to write a letter, exporting a semen sample from a prisoner's cell conceivably entails only slightly more inconvenience to the prison system than does exporting inmate correspondence.<sup>493</sup> Therefore, outgoing semen specimens present as little a threat to security as does outgoing inmate correspondence. Even if a court is hesitant to apply *Martinez* in a prisoner's procreative rights case, out of reluctance to consider the constitutional rights of a civilian spouse allegedly implicated by a prison regulation, it should nonetheless freely apply *Martinez* based solely on the fact that prisoners' rights have been implicated. A court, then, would not have to deal with striking down a prison regulation for impinging on the rights of nonprisoners.

An application of *Martinez* to cases involving prison regulations that restrict prisoners' right to procreate demands that these regulations be invalidated. Such regulations fail the first prong of *Martinez*, because none of the substantial governmental interests of rehabilitation, order, and security are furthered as a result of such restrictions.<sup>494</sup> Moreover, even if a court finds that such regulations do further important governmental interests, regulations totally prohibiting the right to procreate are far broader than is

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*Thornburgh*, 490 U.S. at 410 n.9. This suggests that the *Thornburgh* Court viewed the regulation in *Martinez* as an exaggerated response to prison interests, and therefore, incapable of surviving even minimal scrutiny. *Davis*, *supra* note 3, at 184-85.

492. *Thornburgh*, 490 U.S. at 411.

493. At most, procuring a semen specimen may require a prison to develop collection, handling, and storage procedures for semen, or open up the prison to private medical persons to enter and collect the semen. *See Goodwin*, 908 F.2d at 1398. At least, it would require supplying an inmate with a plastic receptacle to collect his semen. *See Gerber v. Hickman*, 264 F.3d 882, 885 (9th Cir. 2001). A semen sample can be mailed and inspected upon being placed in the prison mailer, like any correspondence. *See id.* Rather than using the mail to transport a prisoner's semen sample, a spouse, attorney, or doctor may go directly to the prison to retrieve the specimen. *See Percy v. State Dep't of Corr.*, 651 A.2d 1044, 1045 (N.J. Super. Ct. App. Div. 1995).

494. *Martinez*, 416 U.S. at 413. For a lengthier discussion of this point, see *supra* notes 292-303 and accompanying text.

essential or necessary, and thus, do not pass the second prong of *Martinez*.<sup>495</sup>

None of the courts that have considered whether prison regulations may justifiably restrict prisoners' right to procreate while incarcerated have applied the *Martinez* standard. Instead, courts have opted for the *Turner* test in deciding the issue.<sup>496</sup> The fact that the Supreme Court has recently narrowed the scope of *Martinez*<sup>497</sup> further suggests that *Turner* is the proper constitutional standard for cases involving prison restrictions on prisoners' rights.<sup>498</sup> The following section argues that regulations restricting a prisoner's right to procreate fail even the less stringent *Turner* standard.

## 2. *Blanket Prison Regulations Restricting Inmates' Fundamental Right to Procreate Are Invalid Even Under the Less Stringent Turner Standard*

Even if a court chooses to apply *Turner* as the proper constitutional standard for reviewing prison regulations that restrict prisoners' right to procreate, it must still strike down such regulations for impinging on prisoners' fundamental right to procreate. These regulations, at least with respect to male inmates, do not withstand the *Turner* four factor analysis as they are not rationally related to legitimate penological interests. The following subsections demonstrate that none of the four factors in *Turner* support a finding that prison regulations restricting male prisoners' right to procreate is rationally related to legitimate penological interests.

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495. *Martinez*, 416 U.S. at 413. (holding that regulations authorizing censorship of prisoner mail were far broader than demanded by any legitimate prison interest).

496. See, e.g., *Gerber*, 264 F.3d 882 (applying the *Turner* test to a prison regulation restricting prisoners' ability to procreate); *Goodwin*, 908 F.2d 1395 (same); *Percy*, 651 A.2d at 1047 (same); see also *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (applying the *Turner* test to a prison regulation restricting female prisoners' ability to exercise the right to nontherapeutic abortion).

497. In *Thornburgh*, the Supreme Court explicitly overruled *Martinez* as the applicable standard for incoming correspondence, even correspondence from non-prisoners. *Thornburgh*, 490 U.S. at 413. However, the Court noted that *Martinez* continued to apply to regulations restricting outgoing correspondence. *Id.*; see *Goodwin*, 908 F.2d at 1401 n.1; *Davis*, *supra* note 3, at 181. For a further discussion of *Thornburgh's* limitation on *Martinez's* holding, see *supra* notes 260-264 and accompanying text.

498. See *supra* notes 311-319 and accompanying text.

*a. Factor 1: No Valid, Rational Connection Exists Between the Prison Regulation and the Legitimate Governmental Interest Put Forward to Justify It*

None of the penological interests offered by prison administrators, including security objectives, equal protection concerns, financial concerns, and a fear of liability,<sup>499</sup> are rationally related to the blanket restrictions imposed to further those interests. With respect to male prisoners' right to procreate, prison regulations do not further important prison security interests, such as inmate or guard safety.<sup>500</sup> Male inmates who wish to exercise their right to procreate pose no greater security risk than any other inmate who requires necessary medical attention.<sup>501</sup> In the artificial insemination context, the fear of prison administrators that the procedure for collecting semen from male inmates will create an unacceptable risk of gassing, or that inmates might send their semen specimens through the mail to unsuspecting individuals, is completely unfounded. No legitimate security threat is posed by providing male inmates with a clean container in which to deposit their semen that would not otherwise be present. Prisoners do not require a receptacle to gas guards or other inmates with their semen. They can just as easily cast their semen onto others with their bare hands, eating utensils, or drinking cups. Therefore, the blanket regulations are not rationally related to the prison interest of maintaining security by preventing misuse of semen.

Similarly, inmates can deposit their semen directly onto correspondence or into envelopes used to mail outgoing correspondence, and achieve their alleged desire to mail their semen to unsuspecting individuals.<sup>502</sup> In contrast, allowing inmates to directly transfer semen samples to their own spouses or doctors would, in fact, help to eliminate these risks, not enhance them.<sup>503</sup> Generally, in this instance, neither guards nor other prisoners would interact with, or be affected by, the semen collection process.<sup>504</sup> Consequently, the security interests of preventing gassing

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499. See *supra* Part II.C.2.a.i.

500. See *supra* Part II.C.2.a.i. (stating the prison does not suggest how the ban could possibly lead to security problems such as flash riots).

501. See *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 338.

502. See *supra* note 277 and accompanying text.

503. See *Goodwin v. Turner*, 908 F.2d 1395, 1400 n.7 (8th Cir. 1990) (stating that providing a clean container to deposit semen in is not very intrusive).

504. See *Gerber v. Hickman*, 264 F.3d 882, 891 (9th Cir. 2001) (not accepting prison's argument that the procedure for collecting semen created an unacceptable security risk).

and errant semen mailings are not furthered by prison regulations that restrict inmates' right to procreate while incarcerated.<sup>505</sup>

Likewise, the argument for equal protection as a legitimate interest justifying prison restrictions on the right to procreate fails because male and female inmates are not similarly situated.<sup>506</sup> The Supreme Court has acknowledged the "basic biological differences" between the sexes, as well as the fact that, "The difference between men and women in relation to the birth process is a real one."<sup>507</sup> Therefore, prison administrators cannot ignore the biological differences between men and women in promulgating regulations that restrict inmates' right to procreate.<sup>508</sup> The right to procreate for male prisoners, namely by artificial insemination, cannot be restricted by blanket prohibitions that are unrelated to legitimate penological interests. Because female inmates are incapable of procreating in the exact same manner as male inmates,<sup>509</sup> the policy of treating male and female inmates equally, to the extent possible, is not implicated in this context.<sup>510</sup>

In addition, fear of liability and financial burdens are not legitimate penological interests that justify complete prohibitions on the right to procreate for all prisoners.<sup>511</sup> The *Gerber* court accurately summed up the argument of concern for liability as justification for prison restrictions on the right to procreate in one word — "reprehensible."<sup>512</sup> It is simply unthinkable and impermissible to restrict

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505. *See id.*

506. *Id.*; *see Goodwin*, 908 F.2d at 1405 (McMillian, J., dissenting) (stating equal treatment of inmates is not a legitimate interest when it is accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right) (citing *Turner v. Safley*, 482 U.S. 72, 90 (1987)). For a further discussion, *see supra* notes 296-299 and accompanying text.

507. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

508. *See Gerber*, 264 F.3d at 891.

509. For a further discussion, *see supra* notes 296-299 and accompanying text. For a further discussion of the assisted reproductive technology procedures available to female inmates, *see infra* notes 535-548 and accompanying text.

510. *See Gerber*, 264 F.3d at 891; *see also Goodwin*, 908 F.2d at 1406 (McMillian, J., dissenting) (stating that equal treatment is not rationally furthered by denying all inmates a constitutional right simply because it might be legitimately denied to some).

511. *See Gerber*, 264 F.3d at 891-92.

512. *Id.* at 891. The court was astounded by the mere suggestion that restricting constitutionally protected rights is justified by the fear of increasing a party's liability. *Id.* at 891-92. Even the Eighth Circuit, in *Goodwin*, rejected the interest of avoiding tort liability as "irrelevant" and "far-fetched." *Goodwin*, 908 F.2d at 1400 n.7 (finding tort liability "irrelevant" because inmate and spouse can sign a waiver releasing the prison from all potential tort liability, and even absent a waiver, grounds for tort liability would be "far-fetched"). For a further discussion, *see supra* notes 382-387 and accompanying text.

the constitutional rights of one group within prisons, out of fear that another group will, as a result, exercise its constitutional rights as well.<sup>513</sup> The financial burden incurred by accommodation of male prisoners' right to procreate also fails as a penological interest sufficient to justify prison restrictions on that right.<sup>514</sup> Although economic factors may be considered in choosing the methods necessary to accommodate constitutional rights, "the cost of protecting constitutional right[s] cannot justify its total denial."<sup>515</sup> Economic factors alone cannot justify imposition of a restrictive regulation that infringes on an inmates' constitutional right.<sup>516</sup>

*b. Factor 2: No Alternative Means of Exercising the Right Remain Open to Prison Inmates*

Prison regulations that restrict prisoners' right to procreate leave inmates with no alternative means of exercising the right to procreate while incarcerated.<sup>517</sup> Totally depriving inmates of the right to procreate results in severe injuries to inmates by denying them the ability to exercise their asserted right,<sup>518</sup> unlike, for example, restrictions on certain First Amendment rights, such as the right to freedom of speech or freedom of association.<sup>519</sup> Inmates still have the ability to exercise their First Amendment rights by interacting with other inmates, or with guards, even though they may not be able to receive outside visits from family or friends. However, their ability to procreate is completely extinguished by blanket prison regulations.<sup>520</sup> Therefore, the lack of alternative means for inmates to exercise the right to procreate demonstrates the unreasonableness of prison restrictions on that right.<sup>521</sup>

Furthermore, the lack of alternative means to exercise the right to procreate has potential devastating, life-long effects on prisoners

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513. See *Gerber*, 264 F.3d at 891.

514. See *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 336 (3d Cir. 1987).

515. See *id.* (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977)).

516. *Id.* (holding that financial concerns alone are insufficient to justify prison restrictions on female inmates' ability to elect to have a nontherapeutic abortion while incarcerated).

517. See *Goodwin*, 908 F.2d at 1400; *id.* at 1405 (McMillian, J., dissenting). For a further discussion, see *supra* notes 389-391 and accompanying text.

518. *Goodwin*, 908 F.2d at 1405 (McMillian, J., dissenting).

519. See *generally*, *Turner v. Safley*, 482 U.S. 78, 92 (1987) (stating that correspondence censorship regulations do not deprive prisoners of all means of expression).

520. See *Goodwin*, 908 F.2d at 1405-06 (McMillian, J., dissenting).

521. See *id.* (McMillian, J., dissenting).

and their respective spouses.<sup>522</sup> Husband and wife may be forced to live a constructively sterile reproductive existence because of prison regulations that deny inmates' ability to procreate with their unincarcerated spouses.<sup>523</sup> Many inmates will never be able to enjoy the fruits of marriage because they will have to live their entire lives in prison.<sup>524</sup> Moreover, free and innocent potential-parent spouses are, in a sense, also punished by prison regulations that deny their incarcerated spouses the right to procreate. The result is that these civilian spouses serve time similar to the prison sentences being served by their incarcerated spouses — alone, without a spouse, and without the ability to exercise their right to “beget or bear a child”<sup>525</sup> with their spouse.

As discussed above,<sup>526</sup> another significant effect of the lack of a prisoner's alternative means to procreate is, assuming an inmate is eventually released, an increased likelihood of bearing a child with genetic abnormalities due to increased maternal age.<sup>527</sup> This increased risk is an unacceptable consequence of a prison regulation not reasonably related to legitimate penological interests.<sup>528</sup> Therefore, the lack of alternative means for inmates to exercise the right to procreate strongly suggests the unreasonableness of prison restrictions on that right.<sup>529</sup>

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522. *See id.* at 1406 n.6. (McMillian, J., dissenting).

523. *See id.* (McMillian, J., dissenting).

524. *See id.* (McMillian, J., dissenting).

525. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (quoting *Eisenstadt v. Baird*, 404 U.S. 438, 453 (1972)).

526. *See supra* note 263.

527. *See Goodwin*, 908 F.2d at 1396-97.

528. In the abortion context, the Third Circuit considered the risk of delay, imposed by prison restrictions on female inmates' ability to exercise the right to abortion, to be a key factor in striking down the regulation. *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 339 (3d Cir. 1987). Although delay in the context of abortion is unquestionably more significant than delay in the procreative context, even in the procreative context, an unnecessary delay of many years is substantial, and a factor courts should definitely take it into consideration when deciding on a prison regulation restricting prisoners' right to procreate.

529. *See Goodwin*, 908 F.2d at 1405-06 (McMillian, J., dissenting).

c. Factor 3: *What Impact Accommodation of the Asserted Constitutional Right Will Have on Guards, Other Inmates, and Prison Resources*

i. Accommodation of the Asserted Constitutional Right for Male Inmates Will Have De Minimis Effects on Guards, Other Inmates, and Prison Resources

The right to procreate while incarcerated, at least for male inmates, can be accommodated at a negligible cost to prison security, administration, and allocation of resources, and with little, or no “ripple effect.”<sup>530</sup> A prison need only provide a male inmate with a clean container in which to deposit his semen while inside his own cell and allow the container to be transported to his spouse.<sup>531</sup> The container need not even be sterile, and prisons could require inmates to pay any expenses incurred during the process if prisoners have the means to do so.<sup>532</sup> Consequently, the procedure would not require expenses for transportation of the prisoner or his semen specimen outside the prison institution to a hospital, or medical laboratory, and would also not require any costs for storage of the semen sample.<sup>533</sup> Therefore, accommodating the right to procreate for male inmates via semen collection for artificial insemination purposes is a de minimis cost for prisons.<sup>534</sup>

ii. Accommodation of the Asserted Constitutional Right for Female Inmates Will Have Significant Effects on Guards, Other Inmates, and Prison Resources

For female inmates, on the other hand, the process of accommodating their procreative rights through assisted reproduction technologies would be very costly.<sup>535</sup> Presumably, legitimate penological interests would justify a total prohibition on female inmates’ ability to become pregnant and bring a child to term while

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530. *See id.* at 1406 (McMillian, J., dissenting).

531. *See id.* (McMillian, J., dissenting).

532. *See id.* (McMillian, J., dissenting).

533. *See id.* (McMillian, J., dissenting).

534. *See id.* (McMillian, J., dissenting).

535. *See* Sherri A. Jayson, Comment, “*Loving Infertile Couple Seeks Woman Age 18-31 To Help Have Baby. \$6,500 Plus Expenses And A Gift*”: *Should We Regulate The Use of Assisted Reproductive Technologies by Older Women?*, 11 ALB. L.J. SCI. & TECH. 287, 328 (2001) (discussing policy-related issues raised by assisted reproductive technology as well as the arguments for and against regulations restricting the current trend of older women using assisted reproductive technology). The high cost of assisted reproduction technology procedures tends to restrict its use to affluent couples or successful single women. *Id.* at 330.

incarcerated via conjugal visitation or otherwise.<sup>536</sup> Alternatively, for female inmates to realize their right to procreate, they would likely have to do so through utilization of assisted reproduction technology procedures, such as In-Vitro Fertilization (“IVF”),<sup>537</sup> or a surrogate mother or female partner, in the case of a lesbian relationship.<sup>538</sup> IVF, the most common assisted reproduction technology procedure, costs between \$8,000 to \$12,000 per cycle,<sup>539</sup> and most women require an average of two or three cycles before becoming pregnant, without necessarily giving birth.<sup>540</sup> Furthermore, insurance companies presently claim that they do not provide coverage for assisted reproduction technology procedures for several reasons including: (1) increased costs; (2) assisted reproduction technology procedures are not medically necessary; and (3) assisted reproduction technology procedures are experimental treatment.<sup>541</sup> Therefore, female prisoners hoping to make use of this technique would be required to have the financial means to cover the high costs of the procedure.<sup>542</sup> This is unlikely because most prisoners are poor.<sup>543</sup>

However, even if a female prisoner could afford the technique, it is a surgical procedure.<sup>544</sup> Thus, female inmates would require ac-

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536. See *Goodwin*, 908 F.2d at 1400 (accommodating female inmates’ right to procreate by permitting pregnancy while incarcerated would be a significant drain on prison resources and undercut important prison security interests). Inmates generally have no constitutional right to exercise their right to procreate while incarcerated via conjugal visits. See *supra* notes 389-391 and accompanying text.

537. This form of assisted reproduction technology consists of the fertilization of a human ovum or ova in a Petri dish and then subsequently transferring the fertilized ovum or ova to a uterus for gestation. IVF allows the conceptus to be placed in the uterus of a second woman if the first woman is unable to carry the fetus. See Jayson *supra* note 535, at 292.

538. See *Gerber v. Hickman*, 264 F.3d 882, 891 n.13 (9th Cir. 2001).

539. See Jayson, *supra* note 535, at 328.

540. See *id.* at 328 n.285.

541. See *id.* at 331.

542. See *supra* note 535.

543. See CLARENCE DARROW, *THE STORY OF MY LIFE* 338 (1934) (“Most . . . inmates are the children of the poor.”); Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 *CRIME & JUST.* 63, 76 (1999) (“most prisoners are recruited from the ranks of the poor . . .”); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 *ANN. SURV. AM. L.* 869, 872 n.13 (1997) (“We have long known that our nation’s prisoners are predominantly poor.”) (citing *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 44 (1967) (“The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country.”)); David M. Adlerstein, Note, *In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 *COLUM. L. REV.* 1681, 1706 (2001) (“Most prisoners are . . . poor.”).

544. See Jayson, *supra* note 535, at 292.



cess to outside medical facilities and doctors to have an egg removed from their bodies to donate to a surrogate, which would very likely pose a significant threat to prison security and order.<sup>545</sup> In sum, unlike the respective reproductive procedure for male inmates, the available assisted reproduction technology procedures for women will impose significant financial burdens on prisons. This will, in turn, result in a drain on prison resources and jeopardize prison security,<sup>546</sup> the latter being the "core function" of the prison administration.<sup>547</sup> Therefore, it is highly likely that prison regulations restricting the right of female inmates to procreate while incarcerated are reasonably related to legitimate penological interests under *Turner*.<sup>548</sup>

*d. Factor 4: The Existence of Ready Alternatives is Evidence of the Unreasonableness of Regulations Restricting Prisoners' Right to Procreate While Incarcerated*

In *Turner*, the Supreme Court found that an alternative that fully accommodates an inmate's right at minimal cost to legitimate penological objectives may serve as evidence that the regulation does not satisfy the reasonable relationship standard.<sup>549</sup> In the procreation context, ready alternatives to prisons' prohibition on the right of inmates to procreate exist and evidence the unreasonableness of these restrictions.<sup>550</sup>

Rather than having a blanket prohibition on inmate procreation, one such alternative is for prison administrators to make decisions on inmates' requests to exercise their right to procreate on a case-by-case basis.<sup>551</sup> Prison administrators should deny such requests only if a particular request would unduly burden the prison or require a significant expenditure of resources.<sup>552</sup> Alternatively, another possibility, pertaining to male inmates specifically, is for prison administrators to permit artificial insemination only if accommodation of the request would cause no significant burden on prison security, administration, and allocation of resources.<sup>553</sup> This alternative to a total restriction on inmate procreation accommo-

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545. See *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

546. See *id.*

547. *Turner v. Safley*, 482 U.S. 78, 92 (1987).

548. See *id.* at 90.

549. *Id.* at 91.

550. See *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting).

551. See *id.* For further discussion, see *supra* notes 400-401 and accompanying text.

552. *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting).

553. *Id.* (McMillian, J., dissenting).

dates at least male inmates' right to procreate at de minimis cost to legitimate penological interests.<sup>554</sup> Therefore, the availability of two ready alternatives to total prohibitions on prisoner procreation is evidence of an "exaggerated response" to prison concerns by prison administrators,<sup>555</sup> and shows that the regulations are not "reasonably related to legitimate penological interests."<sup>556</sup>

### CONCLUSION

With the dark days of *Ruffin*<sup>557</sup> long behind us, prisoners must be afforded the opportunity to exercise the fundamental right to procreate while incarcerated. Because procreation is not "inconsistent with one's status as a prisoner," the right to procreate must, without a doubt, survive incarceration. A lack of a constitutional right to marital intimacy through conjugal visits should have no implications on prisoners' right to procreate, and it is time prison administrators and courts realize this fact. In today's world, modern medical techniques allow people the ability to procreate without so much as touching each other.<sup>558</sup> Although penological interests may weigh in favor of a total restriction on the right to procreate for some inmates, particularly female inmates, legitimate penological interests are not rationally related to prison regulations that completely prohibit the right to procreate for all inmates while incarcerated, specifically male inmates seeking to utilize artificial insemination to impregnate their spouses. When courts have found that the financial and security costs of affording female inmates the right to abortions at outside facilities is not overly burdensome,<sup>559</sup> surely courts should not find the financial and security costs of providing male inmates with a clean cup, in which to collect their semen to artificially inseminate their spouses, to be overly burdensome. Because "no 'iron curtain'" separates prisoners from the Constitution,<sup>560</sup> prisoners must be allowed to exercise the right

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554. See *id.* (McMillian, J., dissenting).

555. See *id.* (McMillian, J., dissenting) (citing *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

556. See *id.* (McMillian, J., dissenting) (citing *Turner*, 482 U.S. at 89).

557. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795 (1871) (a prisoner is "for the time being a slave"). For a further discussion, see *supra* notes 35-38 and accompanying text.

558. See *Gerber v. Hickman*, 264 F.3d 882, 890 (9th Cir. 2001).

559. See *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 336-38 (3d Cir. 1987).

560. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

to procreate, “fundamental to the very existence and survival of the race,”<sup>561</sup> free from “unjustified government interference.”<sup>562</sup>

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561. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

562. *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977).