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Sarah L. Dunn

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## Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Professor Tracy Higgins for her helpful comments and suggestions for this Note. I would also like to thank my family and friends for their constant love, support and encouragement.

# THE "ART" OF PROCREATION: WHY ASSISTED REPRODUCTION TECHNOLOGY ALLOWS FOR THE PRESERVATION OF FEMALE PRISONERS' RIGHT TO PROCREATE

*Sarah L. Dunn**

## INTRODUCTION

Gayle Byrd,[1] a twenty-five-year-old head teller at the Davenport, California, branch of the First Savings Association of California ("First Savings"),[2] has been convicted of seven counts of willfully misapplying funds and knowingly and willfully making false entries into bank records and books. During the two years that Gayle served as head teller of First Savings, she embezzled approximately four thousand dollars from the bank and made false entries into bank records, totaling approximately fifteen thousand dollars. Gayle has been sentenced to seven consecutive three-year terms of imprisonment in a federal penitentiary. If Gayle is to serve her full sentence, she will be forty-six years old when she is released from custody. Gayle's husband, Fred, has supported her throughout the trial, and has frequently visited her in prison. Gayle and Fred are optimists: they hope their dream of having children will be realized when she is released from prison. But they are also realists: they know that the chance of infertility in women dramatically increases with age.[3] Gayle is requesting that the California Department of

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1. Gayle Byrd is a hypothetical woman based on the defendant in the Seventh Circuit case *United States v. Marquardt*, 786 F.2d 771 (7th Cir. 1986).

2. A hypothetical institution.

3. *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, 336 n.2 (2001) (citing N.Y. State Task Force on Life & the Law, Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy 11 (1998)). Most doctors agree that "fertility begins to decline gradually after age 30, with a steeper decline between the ages 35 and 40 and a near loss of reproductive potential by the mid to late forties." *Id.* at 16-17. One *New England Journal of Medicine* article reported that "almost ten per cent of the female population stops ovulating before they reach the age of forty." *Id.* at 289 n.2 (quoting José Van Dyck,

Corrections allow her to utilize Assisted Reproductive Technology ("ART"), specifically *in vitro* fertilization ("IVF"), to extract viable eggs from her ovaries and to freeze them as embryos.[4] These embryos will be used with a gestational carrier[5] or will be used by Gayle when she is released from prison.

It has been sixty years since the Supreme Court first recognized the right to procreate as "one of the basic civil rights of man."[6] The fundamental right to procreate, which is "implicit in the concept of ordered liberty,"[7] may only be infringed when there is a "compelling"

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Manufacturing Babies and Public Consent: Debating the New Reproductive Technologies 179 (1995)).

4. *See* Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 Fordham L. Rev. 93, 114-22 (2001). Yamamoto and Moore describe a typical assisted reproductive cycle as follows:

> On the fourteenth day of the woman's menstrual cycle she begins taking a gonadotropin-releasing hormone agonist ("GnRH-a"). GnRH-a causes the pituitary gland to switch off and stop producing FSH and LH (the egg producing, maturing hormones), thereby allowing the physician to control the maturation and timing of the follicles. GnRH-a causes the cessation of production by desensitizing the pituitary gland after several days of use.... Typically, after two weeks on GnRH-a and during the woman's period, a blood test will be performed to verify that the pituitary gland has been shut down. When this occurs, the egg production phase of the assisted reproductive cycle can begin.
>
> The woman will now take less GnRH-a and begin taking drugs to stimulate her ovaries. In a woman's normal cycle, FSH is produced by the pituitary to signal the ovaries to begin maturing follicles to produce eggs. In an assisted reproductive cycle, human menopausal gonadotropin ("HMG") is used to achieve this same goal.
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> ....
>
> During the administration of the HMG, the woman is required to undergo several blood tests and ultrasound examinations, sometimes daily. These tests provide information on the number and quality of the eggs and indicate the optimum time to retrieve the matured eggs....
>
> Approximately thirty-six hours before retrieval of the eggs the woman is given a shot of hCG. The hCG is similar to the LH that is normally released by the pituitary gland to trigger the release of the eggs from the follicles.
>
> ....
>
> Retrieval is normally an outpatient procedure completed under general anesthetic. The physician uses a needle that is placed through the vaginal wall to aspirate the eggs from the follicles that surround the ovaries.... The entire procedure, from start to finish, takes approximately thirty minutes.
>
> After the eggs are retrieved, the husband is asked to give a sperm sample. The sperm are prepared by removing a portion of the sperm, in a process called capacitation, and then placing them into another liquid. After several hours, the sperm and egg are mixed together and placed in an incubator. They will stay there undisturbed for ten to twelve hours.

*Id.* at 114-18 (footnotes omitted).

5. *See id.* at 123. ART by a gestational carrier uses IVF technology but splits it between two women. *Id.* The embryo of the genetic mother and father is transferred into the uterus of a woman who has agreed to carry the child for the couple. *Id.* at 123-26.

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

7. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

governmental interest that is "narrowly tailored" to advance a state's objectives.[8] The Ninth Circuit recently held that the right to procreate survives imprisonment, and is not temporarily extinguished simply by virtue of incarceration.[9] Although the Ninth Circuit has vacated this opinion pending an en banc hearing,[10] prisoners' exercise of their procreative rights remains a contested issue. New reproductive methods and technologies make procreation possible without contact visitation or conjugal visits.[11] With the availability of this technology, prisoners' fundamental right to procreate should not be restricted. The argument that their procreative rights are "incompatible with the objectives of incarceration"[12] no longer carries much weight. Allowing male and female prisoners to donate their sperm or eggs, respectively, to their spouses[13] poses no serious threat to the penological system, and preserves the prisoners' fundamental right of procreation.

This Note argues that the en banc court of the Ninth Circuit should adopt its vacated *Gerber v. Hickman* decision, which recognizes a male prisoner's right to procreate by donating his semen,[14] and should also protect a female prisoner's procreative rights by allowing her to harvest her eggs while incarcerated. Part I of this Note details the general development of the right to procreate in American courts. This part also explains the limitations of the rights of prisoners, and the disparity in the treatment of male and female prisoners.

Part II discusses the different approaches taken by the circuit courts that have dealt with the controversial issue of prisoners' exercise of their right to procreate. One circuit court refused to allow a male prisoner to send his semen to his non-inmate wife, reasoning that because the right to be inseminated cannot be extended to female prisoners, male prisoners cannot be permitted to inseminate their wives.[15] Another suggested that the right of procreation survives incarceration, and is currently considering whether a male prisoner may reasonably exercise this right to procreate.[16]

Part III argues that the right to procreate while in prison should be recognized for both men and women. Just as male prisoners should

8. *See* Roe v. Wade, 410 U.S. 113, 152-55 (1973).

9. *See* Gerber v. Hickman, 264 F.3d 882, 884 (9th Cir.) (concluding that "the right to procreate survives incarceration"), *vacated*, 273 F.3d 843 (9th Cir. 2001).

10. *See* Gerber v. Hickman, 273 F.3d 843 (9th Cir. 2001) (ordering a rehearing en banc pursuant to Circuit Rule 35-3); *see also* 9th Cir. R. 35-3, http://www.ca9.uscourts.gov/ca9/documents.nsf (last visited Apr. 18, 2002).

11. *See* Yamamoto & Moore, *supra* note 4, at 114-22 (describing IVF, which requires no contact between the male and female for an embryo to be created).

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

13. Or, in the case of female prisoners, they should be able to have their eggs donated for use with a gestational carrier or frozen as embryos for their later use.

14. *Gerber*, 264 F.3d at 882.

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

16. *Gerber*, 273 F.3d 843 (ordering a rehearing by an en banc panel of the court).

be able to donate their sperm for artificial insemination, female prisoners should be allowed to harvest their eggs for use when they are released from prison, or for use with a gestational carrier. A decision maintaining this disparity would effectively sterilize women who are incarcerated during their reproductive years. Granting prisoners such a right does not interfere with any "legitimate penological interest," and denying such a right abrogates prisoners' fundamental right to procreate and substantially interferes with the procreation rights of their non-incarcerated spouses.

## I. THE DEVELOPMENT OF THE RIGHT TO PROCREATE AND THE RIGHTS OF PRISONERS

Procreative rights have endured a long and complex history in American courts. Although the Supreme Court first recognized the right to procreate as a fundamental right under the Equal Protection Clause of the Fourteenth Amendment,[17] the Court has retrospectively construed this right as protected under substantive due process.[18] Although no court has addressed the issue of whether ART is included in the fundamental right to procreate, courts are reluctant to interfere with an individual's decision on such intimate matters.[19]

Prisoners are still afforded many of the rights guaranteed to individuals under the Constitution,[20] though these rights are often restricted by the legitimate goals and policies of the penal system.[21] Many of the rights and privileges provided to male prisoners, however, have not been equally afforded to female prisoners.[22] The disparity in the treatment of male and female prisoners has often been challenged on equal protection grounds.[23]

First, this part discusses the evolution of case law surrounding the right to procreate and specifically the right to procreate using ART. Second, this part explains the limitations imposed upon prisoners' constitutional rights, and the deference given by the courts to the policies of prison officials. Finally, this part reviews the treatment of male and female prisoners with respect to the Equal Protection

17. *See infra* Part I.A.

18. *See infra* Part I.A.

19. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating that the right of privacy includes the right of an individual to make procreative decisions without government intrusion).

20. *See* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (stating that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country").

21. Hudson v. Palmer, 468 U.S. 517, 524 (1984) (finding that prisoners' rights are sometimes curtailed to accommodate the "institutional needs and objectives" of the prison system (citation omitted)).

22. *See* Marya P. McDonald, *A Multidimensional Look at the Gender Crisis in the Correctional System*, 15 Law & Ineq. 505, 545 (1997) (discussing how women have always been given inadequate and unequal services in prison as compared to men).

23. *See, e.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1222 (9th Cir. 1994) (addressing female prisoners' equal protection claims under the Fourteenth Amendment).

Clause, and highlights the discrepancy in the availability of programs and services for male and female prisoners.

### A. *The Right to Procreate: Evolution of Case Law*

#### 1. Recognition of the Fundamental Right to Procreate

There is no clear textual basis in the United States Constitution for the right to procreate. The right to procreate was first recognized by the Supreme Court under the Equal Protection Clause of the Fourteenth Amendment,[24] in *Skinner v. Oklahoma*.[25] The legislation involved in this case was Oklahoma's Habitual Criminal Sterilization Act.[26] Skinner was found to be a "habitual criminal," having been convicted of three crimes of moral turpitude.[27] The Supreme Court of Oklahoma affirmed a judgment directing that a vasectomy be performed on him.[28] Skinner appealed this ruling to the United States Supreme Court. In its majority opinion, the Court expressed concern that "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.... There is no redemption for the individual whom the law touches... [h]e is forever deprived of a basic liberty."[29]

Recognizing procreation as a fundamental right, Justice Douglas, writing for the majority, stated that "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[30] The Court struck down the statute on equal protection grounds, reasoning that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a

24. "*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*" U.S. Const. amend. XIV, § 1 (emphasis added).

25. 316 U.S. 535 (1942).

26. *See id.* at 536. This Act defines an "'habitual criminal' as a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude,'" is thereafter sentenced to a term of imprisonment in an Oklahoma penal institution. *Id.* Furthermore, the Act provides that "[i]f [a] court... finds... that the defendant is an 'habitual criminal' and that he 'may be rendered sexually sterile without detriment to his or her general health,' then the court 'shall render judgment to the effect that said defendant be rendered sexually sterile.'" *Id.* at 537 (citations omitted).

27. *Id.*

28. *Id.*

29. *Id.* at 541.

30. *Id.*

discrimination as if it had selected a particular race or nationality for oppressive treatment."[31]

Retrospectively, however, the Court has construed the opinion in *Skinner* as a substantive due process case involving the fundamental right to procreate, instead of as an equal protection case.[32] The Court later stated that substantive rights are not created by equal protection.[33] Since *Skinner*, the concepts of equality and liberty, and the textual provisions of due process and equal protection, "have been competing though not mutually exclusive bases for deriving fundamental rights."[34] In some cases, the fundamental rights strand of equal protection "is no more than substantive due process by another name."[35]

Whether analyzed from an equal protection or substantive due process vantage point, the liberty interests guaranteed to all citizens under the Fourteenth Amendment encompass a "right to personal privacy, or a guarantee of certain areas or zones of privacy."[36] This right to privacy runs throughout the Constitution.[37] The meaning of the phrase "liberty" incorporated in the Due Process Clause extends beyond the freedom from physical restraint.[38] The Supreme Court has concluded that bodily autonomy, including procreative liberty, is

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31. *Id.*

32. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (citing *Skinner* as one of the cases protecting privacy rights under the Due Process Clause); Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (citing *Skinner* as one of the Court's decisions that "make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing *Skinner* as its authority for finding that the Virginia statutes against interracial marriages "deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment"); *see also* Walter F. Murphy, et al., American Constitutional Interpretation 1018 (2d ed. 1995) (discussing Justice Douglas's eschewal of the straightforward option of deciding *Skinner* on substantive due process grounds as opposed to equal protection grounds).

33. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) ("The Equal Protection Clause commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This provision creates no substantive rights." (citations omitted)).

34. Murphy, et al., *supra* note 32, at 977.

35. Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring in the judgment) (finding that the equal protection doctrine has become the Court's chief instrument for invalidating state laws, yet recognizing that the doctrine is actually substantive due process).

36. *Roe*, 410 U.S. at 152.

37. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (stating that the zone of privacy concerns a relationship created by "several fundamental constitutional guarantees").

38. *See* Planned Parenthood v. Casey, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting that "the term 'liberty' includes a right to marry, a right to procreate, and a right to use contraceptives" (citations omitted)).

inherent in this right to privacy.[39] The Fourteenth Amendment "forbids the government to infringe [upon] 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[40]

When analyzing a right under the Due Process Clause, the first inquiry is whether the infringed or restricted right is a personal right that is fundamental.[41] The test to determine if a right is fundamental examines whether that right is "implicit in the concept of ordered liberty,"[42] as evidenced by our history and traditions.[43] Decisions significant to personal dignity and autonomy, such as the decision to procreate, are central to the liberty protected by the Fourteenth Amendment.[44] If a right is found to be fundamental, the governmental action that infringes upon that right receives a strict scrutiny standard of review.[45] Applying a strict scrutiny standard, the governmental action must further a "compelling" governmental interest and must be "narrowly tailored" to advance the State's objective.[46]

After *Skinner*, the Court again protected procreative liberty in *Griswold v. Connecticut*, when it held that a state statute prohibiting married couples from using contraception was unconstitutional.[47] The Court stated that the statute interfered with the "intimate relation of husband and wife."[48] Thus, the Supreme Court held that married couples had complete control over their rights to procreate.[49] Yet,

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

40. Reno v. Flores, 507 U.S. 292, 302 (1993).

41. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

42. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

43. *See Palko*, 302 U.S. at 325.

44. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (explaining that areas of choice protected by the right of privacy under the Due Process Clause are "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment").

45. Bowers v. Hardwick, 478 U.S. 186, 189 (1986); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a case involving the right to marry); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (applying strict scrutiny to a State's infringement upon the fundamental rights involved in familial relationships); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (applying a strict scrutiny analysis to the fundamental rights of child rearing and education).

46. *See* Roe v. Wade, 410 U.S. 113, 152-55 (1986) (stating that when "certain 'fundamental rights' are involved ... [a] regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake" (citations omitted)); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (explaining that "narrowly tailored" is the "less drastic means" for accomplishing the state's objectives).

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

48. *Id.* at 482.

49. *See id.* at 485-86.

unlike *Skinner*, *Griswold* produced two dissenting opinions.[50] The Court was unanimous concerning a marriage being entitled to privacy, but was not in agreement as to the right to use contraception.[51] The majority decision "was grounded upon the natural rights of a married couple that predate the Bill of Rights."[52] *Griswold*, therefore, brought procreative rights into the realm of privacy.

In *Eisenstadt v. Baird*, the Court went even further than *Griswold* to protect procreative liberties.[53] The Court invalidated a Massachusetts statute that made access to contraceptives for single persons unlawful.[54] Under equal protection, the Court held that it was unconstitutional to allow married couples access to contraceptives, while making similar access illegal for unmarried persons.[55] Although the Court did not exactly endorse contraceptive freedom in this decision,[56] the opinion stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[57] Although this case was decided on equal protection grounds, fundamental rights were again protected under the right to privacy that is implicit in the Due Process Clause.[58]

The Court's expanded recognition of procreative liberty continued in *Carey v. Population Services International*.[59] The Court invalidated a New York statute prohibiting the distribution of contraceptives to

50. *See id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

51. *See* Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 Alb. L.J. Sci. & Tech. 1, 42 n.207 (1997) (discussing the split between the Supreme Court Justices in *Griswold*).

52. *See id.*

53. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding that the "prohibition on contraception . . . violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment").

54. *Id.* at 453-54.

55. *Id.* at 453 ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.").

56. *See* Katz, *supra* note 51, at 42 n.207 (noting that because "[t]he Court . . . was unable to agree whether there is a right of access to contraceptives" and whether or not contraceptives could be banned based on the state's view that their use was immoral, the Court held simply that equal protection mandated universal access to contraceptives).

57. *Eisenstadt*, 405 U.S. at 453 (emphasis omitted).

58. Although the Court based its decision in *Eisenstadt* on equal protection grounds, *id.* at 454 (finding that "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons"), much of the discussion points to the right of privacy as the basis for the ultimate conclusion. *Id.* at 453 ("If the right of privacy means anything, it is the right . . . to be free from unwarranted governmental intrusion into [procreation] . . . .").

59. 431 U.S. 678, 688 (1977) (holding that a state regulation infringing upon the right to contraception "'may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake'" (citation omitted)).

people under the age of sixteen.[60] In Justice Brennan's opinion, the Court clarified the holdings of both *Griswold* and *Eisenstadt*, stating that the right to privacy clearly permits an individual, "without unjustified government interference," to make "personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.' The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[61] Thus, the right to contraception again was protected under the right to privacy implicit in the Due Process Clause.[62] *Carey* not only defined some unenumerated rights that are encompassed by the right to privacy, it also extended these rights to minors.[63]

The Court later extended the right of privacy to include a woman's right to choose to have an abortion.[64] In *Roe v. Wade*, the Court decided that a woman has a right to terminate her pregnancy.[65] The Court, however, placed restrictions on this right.[66] The decision to terminate the pregnancy was limited to the first trimester of pregnancy, and had to be made jointly with the treating physician.[67] The plurality opinion in *Casey v. Planned Parenthood*,[68] however, left the status of *Roe* unclear.[69] *Casey* relied on bodily integrity, maintaining that the choice remains within "a person's most basic decisions about family and parenthood."[70] Although women retain the right to terminate a pregnancy,[71] the Court stated that the

60. *Id.* at 681-82 (affirming a district court ruling that the state regulation prohibiting the distribution of contraceptives to individuals under the age of sixteen was unconstitutional).

61. *Id.* at 685 (citations omitted).

62. *See id.* at 684 ("Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'" (citations omitted)).

63. *See id.* at 691-99 ("State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'" (citations omitted)).

64. *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (finding that statute that permitted abortions only for life-saving reasons violated the Due Process Clause of the Fourteenth Amendment); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992) (reaffirming the Court's holding in *Roe* with respect to "a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State").

65. Roe v. Wade, 410 U.S. 113 (1973).

66. *Id.* at 153 (stating that, when deciding to terminate a pregnancy, "the woman and her responsible physician necessarily will consider in consultation").

67. *Id.* at 164-65.

68. 505 U.S. 833 (1992).

69. *See* Katz, *supra* note 51, at 42-43 n.207 (stating that *Casey* would have reaffirmed *Roe*'s essential holding that a woman has a fundamental right to choose abortion, except for the separate opinions of Chief Justice Rehnquist and Justice Scalia, which overruled *Roe*).

70. *Casey*, 505 U.S. at 849.

71. *See id.* at 898 (reaffirming the essential holding of *Roe*).

controlling word in the Due Process Clause of the Fourteenth Amendment is "liberty," and not "process."[72] Using "liberty" as the controlling word, the Court explained that the Due Process Clause has a substantive component that "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[73] Based on this substantive component of the Due Process Clause, the Court reiterated, "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[74] The Court also looked to the nation's history and traditions to determine the scope of personal liberty.[75] In *Casey*, however, "the Court reaffirmed its authority to define unenumerated rights through reasoned judgment in interpreting the word liberty in the Due Process Clause of the Fourteenth Amendment."[76]

Recognized liberty interests, such as procreative liberty, are not absolute; they must give way to competing state interests of greater weight.[77] The government may not infringe upon the fundamental right of privacy, which encompasses the right to procreate, unless the infringement is narrowly tailored to serve a compelling governmental interest.[78] Furthermore, laws are often based on morality, and the Court has refused to invalidate laws representing moral choices under the Due Process Clause.[79] In *Bowers v. Hardwick*, the Court upheld a Georgia statute that prohibited consensual homosexual sodomy, rejecting a substantive due process claim and denying that such activity is a fundamental right.[80] This decision "illustrate[d] the Court's unwillingness to create new substantive rights of personal

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72. *Id.* at 846 (stating that "the controlling word in the cases before us is 'liberty'").

73. *Id.* (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

74. *Id.* at 847 (citing Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

75. *See* Katz, *supra* note 51, at 46 n.230. The Court has stated "that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

76. Katz, *supra* note 51, at 47.

77. *See id.* at 44 n.214 (citing Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990)).

78. *See Glucksberg*, 521 U.S. at 721 ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

79. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (stating that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed").

80. *Id.* at 191 ("[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

decision-making,"[81] and halted the Court's expansionist view of fundamental rights in the privacy area.[82]

2. Assisted Reproductive Technology and the Right to Procreate

One of the most commonly used forms of ART is IVF. No contact is needed between the male and female for this procedure to occur.[83] Typically, the woman takes a series of hormones over several weeks before undergoing an outpatient procedure that removes the woman's eggs from the follicles surrounding her ovaries.[84] The entire procedure takes approximately thirty minutes.[85] A sperm sample is then taken from the man, and combined and incubated with the female's eggs.[86] The resulting embryos can then be placed into the womb[87] or frozen for later use.[88]

It is unclear whether the fundamental rights regarding procreation include forms of noncoital reproduction such as ART.[89] No court has directly addressed this question. In dicta, one federal district court has suggested that the use of ART would be included in the protection of coital reproduction.[90] A long line of cases support the idea that the government should not interfere with an individual's right to procreate,[91] and this should presumably include the right to procreate using ART.[92] Prisoners' use of ART to exercise their

81. *See* Katz, *supra* note 51, at 44.

82. *Id.*

83. *See* Yamamoto & Moore, *supra* note 4, at 118 (explaining that the man gives a sperm sample after the egg has already been retrieved from the woman's ovaries).

84. *See id.* at 117.

85. *See id.* at 114-18 (providing a detailed explanation of the IVF process).

86. *See id.* at 118.

87. *See id.* at 120. Although the embryo can be transferred to the womb of the woman whose eggs were harvested, it is also possible for there to be a gestational surrogacy. *See id.* at 110. In that case, the gestating woman is not the genetic parent of the fetus that she carries. *See id.*

88. *See id.* at 120 n.138 (explaining the process of freezing embryos).

89. *See generally* Ethics Comm. of the Am. Fertility Soc'y, *Ethical Consideration of Assisted Reproductive Technologies*, Fertility & Sterility, Nov. 1994 at 3S-7S (Supp. 1) (discussing the inclusion of noncoital reproduction within the constitutional right to procreate).

90. *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1363 (N.D. Ill. 1990) (holding that an Illinois abortion statute violated the Fourteenth Amendment's guarantee of due process because of vagueness and also that the statute impinged upon a woman's right of privacy and reproductive freedom).

91. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *see also supra* Part I.A.1.

92. *See* Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 Am. J.L. & Med. 455, 464 n.89 (1999) (stating that a failure to extend procreative liberties to those using noncoital methods to reproduce may be considered a violation of equal protection).

procreative rights is a contested issue, especially in light of the already extensive limitations on prisoners' rights.

### B. *Limitations on Prisoners' Rights*

Although "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,"[93] "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[94]

Courts have established that inmates retain certain rights that are "not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system."[95] While courts have remained aware of their responsibility to abstain from judicial activism on issues dealing with prison administration, they also have acknowledged that they have a responsibility to respond when prison officials unconstitutionally deny prisoners their already limited rights.[96]

Prisoners' rights are subject to restrictions imposed by the legitimate goals and policies of the penal system.[97] The restriction of rights is justified by the institutional needs of prison facilities—especially internal security—and by the systemic goals of deterrence, retribution, and correction.[98] Yet prisoners must be allowed the rights

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

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

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

96. *See* Turner v. Safley, 482 U.S. 78, 85 (1987) (recognizing that the Court lacks the expertise to make judgments about prison rules and regulations); Block v. Rutherford, 468 U.S. 576, 584-85 (1984) (holding that courts should defer to the "expert judgment" of the prison administrators); *Bell*, 441 U.S. at 540-41 (holding that courts should defer to the adoption of policies by prison officials necessary for the order and security of the prison); *see also* 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, 163-64 (1993). Davis lists several reasons why courts have abstained from reviewing prison regulations that may have burdened prisoner's rights: (1) the separation of powers doctrine (Procunier v. Martinez, 416 U.S. 396, 405 (1974) ("[E]xpertise, comprehensive planning, and the commitment of resources [are] all . . . within the province of the legislative and executive branches of government.")); (2) federalism concerns; (3) the lack of judicial expertise in prison administration (*Pell*, 417 U.S. at 827 (noting that rehabilitation and institutional security considerations "are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters"); (4) sensitivity to the difficulty of prison management (Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (asserting that the operation of a prison is exceedingly difficult and courts must afford officials the necessary discretion)); (5) general deference to prison officials' judgment (*Bell*, 441 U.S. at 547 ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.")).

97. Hudson v. Palmer, 468 U.S. 517, 524 (1984) ("The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities." (citations omitted)).

98. *See id.* (stating that internal security is among the most important institutional

"not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[99] For example, prisoners maintain many First Amendment protections, such as their religious freedom and right to speech,[100] but do not have a Fourth Amendment expectation of privacy in their prison cells.[101] And although a prisoner's marital rights are "subject to substantial restrictions as a result of incarceration,"[102] many of the important aspects of marriage are protected, including emotional support, public commitment, spiritual significance, and the hope of full consummation of the relationship in the future.[103] The Supreme Court stated that "[t]hese incidents of marriage... are unaffected by the fact of confinement or the pursuit of legitimate corrections goals."[104]

There are two major penological objectives for a correctional facility. First, imprisonment is intended to achieve deterrence, incapacitation, and rehabilitation of the prisoners.[105] The second and central objective of a prison facility is to preserve security by maintaining order within the correctional facility.[106] Courts have repeatedly emphasized the importance of a prison's internal security interests.[107]

The Supreme Court has held that, for a prison regulation to be constitutionally valid, it must be "'reasonably related to legitimate penological interests.'"[108] This reasonableness standard applies even when the right is fundamental.[109] The Court has held that "such a

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needs of the penal system).

99. *Id.* at 523.

100. *Id.* ("Prisoners must be provided 'reasonable opportunities' to exercise their religious freedom guaranteed under the First Amendment. Similarly, they retain those First Amendment rights of speech 'not inconsistent with [their] status as... prisoner[s] or with the legitimate penological objectives of the corrections system.'" (internal citations omitted)).

101. *Id.* at 525-26 (holding that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell").

102. Turner v. Safley, 482 U.S. 78, 95 (1987).

103. *See id.* at 95-96 ("Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life.").

104. *Id.* at 96.

105. Pell v. Procunier, 417 U.S. 817, 822 (1974); *see generally* Daniel Pollack, et al., Goodwin v. Turner*: A Comparison of American and Jewish Legal Perspectives on Procreation Rights of Prisoners*, 86 Ky. L.J. 367, 370 (1997) (discussing the two-fold approach of penological objectives).

106. *See* Bell v. Wolfish, 441 U.S. 520, 540 (1979) (stating that "the Government must be able to take steps to maintain security and order at the institution"); *see also Pell*, 417 U.S. at 823 (determining that a prison's security interests are "central to all other corrections goals").

107. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 524 (1984) (stating that prison security is one of the major objectives of a correctional facility).

108. Washington v. Harper, 494 U.S. 210, 223 (1990) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

109. *Id.* at 224.

standard is necessary if 'prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations.'"[110] The reasonableness standard, articulated in *Turner v. Safley*, is as follows: (1) "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";[111] (2) where the prisoner retains alternative means of exercising the right, "courts should be particularly conscious of the measure of judicial deference owed to corrections officials";[112] (3) a court must consider "the impact [of] accommodation of the asserted constitutional right . . . on guards and other inmates, and on the allocation of prison resources generally";[113] and (4) "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[114] This low standard, which provides a high level of deference to prison authorities, has been criticized by Justice Stevens.[115] In his dissent in *Turner*, Justice Stevens argued that the standard renders the Court's scrutiny meaningless.[116]

The Court has struggled to reconcile the "reasonableness" standard laid out in *Turner* with previous decisions that suggest a heightened level of scrutiny for reviewing some prison regulations. In *Procunier v. Martinez*, for example, the Court applied a heightened level of scrutiny to a regulation allowing for censorship of prisoners' mail.[117] Subsequently, however, the Court has construed the *Martinez* case as a special case because it did not "pose a serious threat to prison order and security."[118] Furthermore, the *Turner* reasonableness standard has not been uniformly applied to equal protection challenges of prison regulations. Some courts have applied the reasonableness standard,[119] while others have applied a more heightened level of scrutiny.[120]

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110. *Turner*, 482 U.S. at 89 (citation omitted).

111. *Id.*

112. *Id.* at 90 (internal quotations omitted).

113. *Id.*

114. *Id.*

115. *Id.* at 100 (Stevens, J., concurring in part and dissenting in part) ("[I]f the standard can be satisfied by nothing more than a '*logical* connection' between the regulation and any legitimate penological concern perceived by a cautious warden . . . it is virtually meaningless."); *see also* Jacqueline B. DeOliveira, Comment, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 Touro L. Rev. 189, 195 (1988) (discussing Justice Stevens' dissent in *Turner*).

116. *Turner*, 482 U.S. at 100-01 (Stevens, J., concurring in part and dissenting in part) ("Application of this standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.").

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

118. *See* Thornburgh v. Abbott, 490 U.S. 401, 411 (1989).

119. *See, e.g.*, Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir. 1990); Jackson v.

### C. *The Disparity of Prisoners' Rights: Equal Protection of Male and Female Prisoners*

As discussed above, the privileges and rights of prisoners are limited during their incarceration.[121] Inmates retain only those rights that are not inconsistent with their status as prisoners. Many prisons offer educational, vocational, employment, and rehabilitation programs for the inmates.[122] The application of these programs as between male and female prisoners, however, has not been equal.[123] Advocates attempting to increase the rights of female prisoners have relied on an equal protection theory.[124] This theory has been used by female prisoners to acquire programs and services that were denied because they were not cost effective or because prison officials believed female prisoners were not qualified to participate in the educational and occupational programs that were afforded to male

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Thornburgh, 907 F.2d 194, 197 (D.C. Cir. 1990) (holding that, when statute does not facially draw a gender-based distinction the lower level of scrutiny is appropriate); *see also* Irah H. Donner, Case Comment, Goodwin v. Turner*: Cons and Pro-Creating*, 41 Case W. Res. L. Rev. 999, 1002 n.23 (1991).

120. *See, e.g.*, Pitts v. Thornburgh, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); McMurry v. Phelps, 533 F. Supp. 742, 767 (W.D. La. 1982); Batton v. State Gov't, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980); Glover v. Johnson, 478 F. Supp. 1075, 1078 (E.D. Mich. 1979); *see also* Donner, *supra* note 119, at 1002 n.24.

121. *See supra* Part I.B.

122. *See generally* Karen F. Lahm, *Equal or Equitable: An Exploration of Educational and Vocational Program Availability for Male and Female Offenders*, 64 Fed. Probation 39 (Dec. 2000) (discussing various educational and vocational programs available for male and female offenders). Many prisons offer GED or Adult Basic Education programs, and some even offer four-year college programs to inmates. *See id.* at 39-40. Some prisons offer a wide variety of vocational training programs, including dental assistance, nursing assistance, carpentry, cabinet making, and many more. *See id.* at 40.

123. *See id.* at 39 (stating that female inmates are offered fewer opportunities for educational and vocational training than their male counterparts); *see generally* McDonald, *supra* note 22, at 510 (arguing that men and women are not similarly situated in the context of prisons). Women have always been given inadequate and unequal services in prison as compared to men. *Id.* at 545; *see also* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151, 2205 (1995) (stating that it is possible to have separate but equal facilities for men and women). Women should not be denied programs, such as child rearing and prenatal care, just because the programs are not offered for or demanded by men. Inmates' needs and preferences should be considered when designing programs and services. Preparation for employment and the enhancement of marketable skills should be a priority. Yet effective pursuit of these goals will sometimes require different programs for women. *Id.*; *see also* Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182, 1182-83 (1985) (stating that, in segregated prisons, women have access to fewer rehabilitative programs than men, and those offered are inferior to those offered to men).

124. *See* Rebecca Jurado, *The Essence of her Womanhood: Defining the Privacy Rights of Woman Prisoners and the Employment Rights of Woman Guards*, 7 Am. U.J. Gender Soc. Pol'y & L. 1, 18 (1999) (citing Jeldness v. Pearce, 30 F.3d 1220, 1222 (9th Cir. 1984).

prisoners.[125] Yet the expansion of programs for female prisoners has been limited strictly to programs already being provided to male prisoners.[126]

Much of the relevant case law concerning equal protection arises from cases involving female inmates who claim unequal treatment with respect to educational and vocational training between male and female inmates.[127] Due to discrepancies in access, female prisoners are less likely than male inmates to receive the training necessary to improve their opportunities when they are released from prison.[128] In order to prevail in their equal protection claims, female prisoners must show that "a person is similarly situated to those persons who allegedly received favorable treatment."[129] The Supreme Court has never held that female and male prisoners are automatically "similarly situated," but rather has left this decision to be made on a case-by-case basis by the lower courts. There are many factors within the prison system that must be considered when determining if the male and female prisoners are similarly situated, including the characteristics of the prisoners and the size of the institution.[130] A discrepancy between the programs and services for male and female prisoners does not necessarily lead to a holding that there is an equal protection violation.

In equal protection jurisprudence, courts must determine what level of scrutiny applies to a particular classification; suspect, intermediate or rational basis.[131] Classifications based on gender have never been held by the Court to be inherently suspect and therefore is not subject to strict scrutiny. Justice Brennan's plurality opinion in *Frontiero v. Richardson*, however, did consider gender, like race for example, to be inherently suspicious and therefore subject to the heightened level of scrutiny.[132] *Craig v. Boren* made gender a "somewhat suspicious" category, and a new test, "intermediate scrutiny," was created by the Court for sex-based classifications.[133] To overcome this level of

125. *See id.* at 18 (citing *Jeldness*, 30 F.3d at 1229-30).

126. *See id.*

127. *See* Kara Stinson, *Letting Time Serve You: Boot Camps and Alternative Sentencing for Female Offenders*, 39 Brandeis L.J. 847, 856 (2001).

128. *See id.*

129. Women Prisoners v. Dist. Of Columbia, 93 F.3d 910 (D.C. Cir. 1996) (internal quotations omitted); *see also* Julie Kocaba, Note, *The Proper Standard of Review: Does Title IX Require "Equality" or "Parity" of Treatment When Resolving Gender-Based Discrimination in Prison Institutions?*, 25 New Eng. J. on Crim. & Civ. Confinement 607, 621 (1999).

130. *See* Klinger v. Nebraska Dept. of Corr. Servs., 31 F.3d 727, 731-32 (8th Cir. 1994).

131. *See supra* Part I.A.

132. Frontiero v. Richardson, 411 U.S. 677, 688 (1973) ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

133. Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to

intermediate scrutiny, the government must show that the classification is substantially related to a sufficiently important government interest.[134] Given the variety of standards, courts have not been uniform in their treatment of equal protection claims brought by female prisoners seeking to gain access to programs and services provided to their male counterparts. However, when a court finds male and female prisoners to be similarly situated, equal protection claims are often upheld.[135]

1. Courts Finding Equal Protection Violations

At the district court level, there have been several courts that have found equal protection violations in prison conditions for female inmates. In *McMurry v. Phelps*, female inmates claimed that they were treated differently than male inmates because women were not permitted to serve as trustees or to participate in work release programs, and female inmates were not allowed to serve their time at a nearby prison farm.[136] Furthermore, the conditions for the male prisoners at the prison farm were drastically different from the conditions for the female prisoners within the prison.[137] Male prisoners at the prison farm were allowed to participate in work release programs and to receive secondary educational opportunities.[138] They also had access to contact visitation, drug and alcohol abuse programs, sports and exercise programs, better food,

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achievement of those objectives.").

134. *Id.* (finding gender classifications must serve "important governmental objectives" and be "substantially related to achievement of those objectives"). Other classifications receive the lowest level of scrutiny, "rational basis" review, whereby the classification is presumed valid as long as it is rationally related to a legitimate state interest. *See* Romer v. Evans, 517 U.S. 620, 632 (1996). Courts are extremely deferential to the government under this standard, and will uphold the classification if there is some rational basis for it. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (stating that the party attacking the rationality of the classification has the burden to "negative every conceivable basis which might support it" (citation omitted)). Yet, even this most deferential tier of scrutiny has sufficient "bite" to occasionally require the Court to strike down a law. *See* Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 Tul. L. Rev. 81, 123 n.238 (2001) (discussing the "'rational basis [review] with [a] bite'" approach to the rational basis review (citation omitted)). For example, the Court has applied the "rational basis" review to invalidate a Colorado constitutional amendment that repealed and banned the enactment of laws that prohibited discrimination against gays, lesbians, and bisexuals. *See* Romer, 517 U.S. at 635; *see also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985) (invalidating the city's special-use permit requirement because it was based on irrational prejudice).

135. *See infra* Part I.C.1.

136. McMurry v. Phelps, 533 F. Supp. 742, 757 (W.D. La. 1982), *rev'd on other grounds*, Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985).

137. *Id.* at 757-58.

138. *Id.*

and more open space.[139] The prison authorities justified this disparity in treatment of male and female prisoners as necessary to prevent sexual relations between the prisoners.[140] The court found that the prison "advanced no compelling reason for this disparate treatment,"[141] and found that the conditions at the prison violated the equal protection rights of the female prisoners.[142]

In *Canterino v. Wilson*, the court held that the conditions of confinement, disparate treatment of men and women inmates in Kentucky's prisons, and the denial of opportunities for vocational training and education violated the equal protection rights of the female inmates.[143] The punitive system of behavior modification used at the female prison "result[ed] in massive disparities within Kentucky's penal system between male and female prisoners in the availability of privileges and the opportunity to fulfill basic human needs," and the court concluded that "[t]hese pervasive disparities exist without state purpose or penological justification to support them."[144] Female prisoners were also denied access to many vocational, educational, and training programs that were available to male prisoners.[145] The programs that were available to the female prisoners were inferior in quality to the corresponding programs at the male institutions.[146] The court found that the differential treatment between male and female prisoners was "unrelated to any important government objective, [and] violate[d] fundamental notions of fairness embedded in the constitution and expressed in the Equal Protection Clause."[147] The court stated that "the Equal Protection Clause requires parity, not identity, of treatment for female prisoners in the area of jobs, vocational education, and training."[148] Programs for male and female prisoners may be different so long as they provide essentially the same opportunities.[149]

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Canterino v. Wilson, 546 F. Supp. 174, 179 (W.D. Ky. 1982).
144. *Id.* at 188.
145. *Id.*
146. *Id.* at 188-89. The Kentucky Correctional Institution for Women had only two vocational course offerings for female inmates: business office education and upholstery. *Id.* at 189. Due to the absence of modern equipment, these two courses were of limited value in the competitive job market. *Id.* These courses for women were offered only on a part-time basis, while the vocational courses at the men's prisons were full-time. *Id.* The average annual salary for trades in which men can receive vocational training is $16,726.21. For women, the average is $11,846.50. *Id.* at 190.
147. *Id.* at 207.
148. *Id.* at 210 (citing Glover v. Johnson, 478 F. Supp. 1075, 1079 (D.C. Mich., 1979)).
149. *Id.*

More recently, in *West v. Virginia Department of Corrections*, a district court held that providing the opportunity to male prisoners to attend a "boot camp," which allowed prisoners to be eligible for early release, but not to female prisoners was impermissible sex discrimination.[150] Virginia prison officials had argued that a comparative lack of demand among women, who were a small percentage of the overall prison population, justified providing boot camp facilities to men only.[151] As a result of this disparity in treatment, female prisoners were "subject to longer sentences of incarceration and parole."[152] The district court found that the correctional system could not "provide programs and favorable sentencing to male inmates solely on the basis that the problems are more pressing in male prisons and it is more cost-effective to address those problems."[153]

Circuit courts have also found equal protection violations in prison cases. In *Yates v. Stalder*, male inmates brought an equal protection claim based on discrimination in their living conditions.[154] The male prisoners argued that the disparity in the living arrangements between male and female prisoners was a violation of their Fourteenth Amendment rights.[155] Male prisoners claimed that their living conditions were significantly harsher than those provided for female inmates.[156] Specifically, the male prisoners claimed that female inmates did not have to labor in agricultural fields, could be assigned to private or semi-private rooms through participation in a merit program, and were confined in air-conditioned units.[157] The Fifth Circuit determined that the equal protection claims were improperly dismissed by the district court because it could not be determined from the record whether male and female inmates are similarly situated.[158] The court stated that "[i]f legitimate penological goals can rationally be deemed to support the decision to treat male and female prisoners differently, then they are not similarly situated for equal protection purposes. But that is not a conclusion that we can draw from the present record."[159]

150. West v. Va. Dep't of Corr., 847 F. Supp. 402, 408 (W.D. Va. 1994).
151. *Id.*
152. *Id.* at 404.
153. *Id.* at 407.
154. Yates v. Stalder, 217 F.3d 332, 333 (5th Cir. 2000) (claiming that their living conditions were significantly harsher than those of their female counterparts).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 335.
159. *Id.*

### 2. Courts Denying Equal Protection Claims

By contrast, a number of courts declined to find equal protection violations because male and female prisoners are not similarly situated.[160] The Fifth Circuit, in a decision prior to *Yates*, found no equal protection violation where male prisoners were prohibited from engaging in vocational classes at a female prison because that policy was substantially related to the important governmental objective of maintaining prison security.[161] The Eighth Circuit also has found no equal protection violation when the State created different policies for male and female institutions.[162] The Eighth Circuit reasoned that the male and female prisoners were not similarly situated and that the state's decision was rationally related to the legitimate penological interest of prison security.[163]

Similarly, the D.C. Circuit Court found no equal protection violation when male prisoners, but not female prisoners, benefited from an early release statute.[164] The court reasoned that the statute, as applied to men, was rationally related to alleviating overcrowding in the prison facilities.[165]

In a separate case, the D.C. Circuit also rejected an equal protection claim from a group of female prisoners who alleged that they were not afforded the same educational, vocational, work, recreational, and religious programs as male prisoners.[166] The court held that the male and female prisoners were not similarly situated because the male prison had a much larger population than the female prison.[167] The court noted that the female prisoners failed to

160. *See, e.g.*, Prince v. Endell, 78 F.3d 397 (8th Cir. 1996); Smith v. Bingham, 914 F.2d 740 (5th Cir. 1990); Jackson v. Thornburgh, 907 F.2d 194 (D.C. Cir. 1990).

161. *Smith*, 914 F.2d at 742 (stating that prison "[s]ecurity is a central concern of prison officials," that "[t]he state's interest in prison security is clearly an important governmental objective, and the record reveals that the prison's policy is . . . substantially related to furthering that interest").

162. *Prince*, 78 F.3d at 399 ("[I]t was objectively reasonable for a prison official to believe that female and male inmates were not similarly situated . . . . [A] reasonable prison official could have found the difference in policies to be rationally related to legitimate security interests.").

163. *Id.*

164. *Jackson*, 907 F.2d at 196-98.

165. *Id.*

166. Women Prisoners v. Dist. of Columbia, 93 F.3d 910, 923-26 (D.C. Cir. 1996) ("[T]he difference in the number of programs provided by prisons having vastly different numbers of inmates cannot be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection."). For a discussion of the court's handling of the equal protection claim in *Women Prisoners*, see Kocaba, *supra* note 129, at 619-23. Kocaba states that while prison regulations are subject to the "reasonableness" standard laid out by the Supreme Court in *Turner v. Safley*, "regulations vis a vis gender discrimination" are subject to a more heightened standard of scrutiny. *Id.* at 619.

167. *See Women Prisoners*, 93 F.3d at 925-26 (noting that there are 936 male inmates and 167 female inmates at the prisons at issue).

demonstrate that prison officials allocated fewer resources per female inmate than per male inmate.[168]

In *Klinger v. Nebraska Department of Correctional Services*, inmates housed in Nebraska's exclusively female prison filed a class action alleging that the Department of Corrections violated their equal protection rights by providing them with inferior vocational, educational, employment, recreational, and medical opportunities and programs as compared to those it provided male inmates.[169] The prison system was permitted to allocate resources so that female prisoners, but not males, were allowed overnight visits with their children, and male prisoners, but not females, were given extensive vocational training.[170]

On appeal, the Eighth Circuit held that there was no equal protection violation where female prisoners received inferior programs as compared to male prisoners because the two were not similarly situated regarding prison programs and services.[171] Nonetheless, the court suggested that, even if the female plaintiffs were similarly situated to the comparison group, their equal protection claim would fail because they had not shown purposeful discrimination,[172] which is required to establish an equal protection violation by the creation of a non-facial classification.[173] Non-facial classifications "are subject to heightened scrutiny *only* upon proof that they have a disparate impact on a protected group *and* are motivated by a discriminatory intent."[174] By contrast, facial classifications, that is, overt gender classifications of similarly situated people, are subject to the heightened scrutiny set forth in *Craig v. Boren*.[175] Under this heightened standard of review, the government bears the burden of establishing that the gender classification has an important purpose, and that the relationship between the purpose and the classification is substantial.[176] Intentional discrimination can be presumed where the government fails to meet this burden.[177]

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168. *See id.* at 925. *But see* Plyler v. Doe, 457 U.S. 202, 227 (1982) ("[C]oncern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (The state "may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions . . . .").

169. Klinger v. Neb. Dep't of Corr. Servs., 824 F. Supp. 1374, 1382, 1385 (D. Neb. 1993); *see also* Kocaba, *supra* note 129, at 624-40.

170. *Id.* at 1404-07, 1429-31.

171. Klinger v. Dep't of Corr. Servs., 31 F.3d 727, 729, 731 (8th Cir. 1994).

172. *Id.* at 733-34.

173. *Id.* at 737 (McMillian, J., dissenting).

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

175. 429 U.S. 190, 197 (1976) ("[C]lassifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" (citation omitted)).

176. *Id.*

177. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272-74 (1979) (holding that, to

Courts disagree as to whether male and female prisoners should be considered similarly situated, and the Supreme Court has not resolved this controversial issue. Finding that male and female prisoners are similarly situated is essential in order for the procreative rights of male and female prisoners to be equally protected. The next part of this Note describes the controversy concerning the right to procreate by male and female prisoners.

## II. PROCREATION WHILE INCARCERATED: DIFFERENT STANDARDS FOR MALE AND FEMALE PRISONERS

Courts have not been consistent in their treatment of a prisoner's right to procreate while incarcerated. This part sets forth the controversy surrounding the exercise of the fundamental right to procreate by prisoners. The Eighth Circuit denied a male prisoner's right to procreate because it concluded that the same right could not be extended equally to female prisoners.[178] The Ninth Circuit, in a recently vacated opinion, suggested that the right to procreate survived incarceration, and that male prisoners could send their semen to their wives for artificial insemination.[179] The Ninth Circuit declined to rule on whether the same right would be protected for female prisoners, but noted that the biological differences make pregnancy inconsistent with a woman's status as a prisoner.[180]

### A. *The Right to Procreate While in Prison*

The fundamental freedom to make reproductive decisions is severely limited in prison.[181] Certain jurisdictions have attempted to strictly curtail the rights of prisoners to marry and to procreate, while others have recognized those rights during incarceration.[182] For example, in *Bradbury v. Wainwright*, the Eleventh Circuit upheld the authority of the Florida Department of Corrections to create regulations restricting the marriage rights of inmates.[183] Conversely, in *Salisbury v. List*, the Nevada district court found that a state prison regulation that denied women the right to marry prison inmates was an unconstitutional interference with the fundamental right to marry.[184]

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determine if a facially gender-neutral statute affects women disproportionately, the court must first ask if "the statutory classification is indeed neutral in the sense that it is not gender based" and then "whether the adverse effect reflects invidious gender-based discrimination").

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

179. *See* Gerber v. Hickman, 264 F.3d 882 (9th Cir.), *vacated,* 273 F.3d 843 (9th Cir. 2001).

180. *See id.*

181. *See supra* Part I.B.

182. DeOliveira, *supra* note 115, at 189-90, 190 nn.6-7.

183. Bradbury v. Wainwright, 718 F.2d 1538, 1539-40 (11th Cir. 1983).

184. Salisbury v. List, 501 F. Supp. 105, 110 (D. Nev. 1980).

Courts have never deemed conjugal visits a constitutional right.[185] Although the Court has recognized that ability to procreate survives incarceration,[186] courts have concluded that a prisoners' maintenance of a sexual relationship is logically inconsistent with his or her incarceration, and with the prison's security interest.[187] Certain prisons, however, do provide private visitation rooms or units to prisoners and their spouses.[188]

Although conjugal visits are not constitutionally guaranteed, "[c]ertain aspects of procreative freedom are already protected for prisoners."[189] The Federal Bureau of Prisons has established regulations, for example, that protect the right of a pregnant woman in prison to choose to terminate her pregnancy.[190] Further, some courts have upheld the freedom to make reproductive decisions during imprisonment. For example, in *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit found an Eighth Amendment violation in a prison policy that required a court order before permitting elective nontherapeutic abortions.[191] The court reasoned that this policy unconstitutionally interfered with female prisoners' right to procure an abortion and constituted deliberate indifference to a serious medical need.[192] The court recognized that female inmates have the fundamental procreational right to choose to terminate a pregnancy—and that the costs incurred in accommodating prisoners' constitutional rights cannot justify the complete deprivation of those rights.[193] *Skinner* and *Lanzaro*, taken together, "demonstrate that the right to procreate falls within the cluster of constitutionally protected rights that survive incarceration. Prison policies and regulations may not burden this right absent, at a minimum, a logical connection between the exercise of that right and legitimate penological interests."[194] Therefore, to some degree, the procreative liberties of prisoners, such as the right to abortion, have been protected; yet it is still unclear if reproductive liberties, for

185. *See, e.g.*, Lyons v. Gilligan, 382 F. Supp. 198, 200 (N.D. Ohio 1974) (concluding that the state is not obligated to make private places available for prisoners to maintain sexual relations).

186. *See* Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942); *see also supra* Part I.A.

187. *See, e.g.*, *Lyons*, 382 F. Supp. at 200 (holding that a prisoner's constitutional right to privacy is not infringed by the absence of facilities for conjugal visits or by a prison regulation prohibiting sexual conduct between the prisoner and his non-incarcerated spouse during visitations).

188. *See* Shaun C. Esposito, *Conjugal Visitation in American Prisons Today*, 19 J. Fam. L. 313, 319-25 (1981).

189. DeOliveira, *supra* note 115, at 202.

190. *Id.*

191. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 344-49 (3d Cir. 1987).

192. *Id.* at 348-49.

193. *See id.*

194. Davis, *supra* note 96, at 169-70.

example, the affirmative right to have children, are included in the rights already protected by the courts.

In general, however, both correctional systems and the courts have been overwhelmingly restrictive of prisoners' procreational rights. The Fifth Circuit found that there was no constitutional violation when a female inmate was prohibited from breastfeeding her child because the goals and needs of the penal system—of deterrence and retribution, internal security, and avoiding financial burden—outweighed the inmate's interest.[195] In *Gibson v. Matthews*, the Sixth Circuit found that there was no violation of the Fifth, Eighth, or Ninth Amendments when delays by prison officials resulted in the inability of a female prisoner to have an abortion.[196] The federal regulation stating that officials should assist inmates in seeking abortions was considered discretionary, not mandatory.[197]

In the past twelve years, two circuit courts have tackled the controversy surrounding the right of male prisoners to artificially inseminate their non-inmate wives. The Eighth Circuit, in *Goodwin v. Turner*, found that the right of male prisoners to artificially inseminate their wives could be denied as reasonably related to the legitimate penological interest of treating male and female prisoners equally.[198] The court explained that because the right to be inseminated could not be given to the female prisoners, the corresponding right of male prisoners to inseminate another could be prohibited.[199] Most recently, in *Gerber v. Hickman*, the Ninth Circuit suggested that the right to procreate survives incarceration, and can only be restricted to achieve legitimate penological interests.[200] The court implied that the interests advanced by the California Department of Corrections were not sufficient to justify denying Gerber his right to procreate.[201] Recently, the Ninth Circuit vacated *Gerber*, and an en banc panel reheard the case on March 20, 2002.[202] The next two sections discuss the reasoning of these two cases with respect to their recognition, both explicit and implicit, of prisoners' rights.

195. Southerland v. Thigpen, 784 F.2d 713, 715-17 (5th Cir. 1986).
196. Gibson v. Matthews, 926 F.2d 532, 536-38 (6th Cir. 1991).
197. *See id.* at 538.
198. Goodwin v. Turner, 908 F.2d 1395, 1399-1400 (8th Cir. 1990).
199. *Id.*
200. Gerber v. Hickman, 264 F.3d 882, 892, *vacated,* 273 F.3d 843 (9th Cir. 2001).
201. *See id.*
202. Gerber v. Hickman, 273 F.3d 843 (9th Cir. 2001); *see also* United States Court of Appeals for the Ninth Circuit Website, *at* http://www.ca9.uscourts.gov (listing pending en banc cases) (last visited Apr. 18, 2002).

### B. *The Eighth Circuit Recognizes Potential Equal Protection Issues:* Goodwin v. Turner

In *Goodwin*, the Eighth Circuit avoided the question of whether the right to procreate survives incarceration, holding only that the prison regulation prohibiting prisoners from artificially inseminating another person was "reasonably related to achieving its legitimate penological interest"[203] of treating male and female prisoners equally.[204] Goodwin, a male prisoner incarcerated in Missouri, filed a habeas petition in federal district court in an attempt to compel the Bureau of Prisons to "'provide [him] with a clean container in which to deposit his ejaculate, and a means of swiftly transporting the ejaculate outside the prison'"[205] to his wife for artificial insemination. Goodwin asserted that the Bureau of Prison's refusal to allow him to provide semen to his wife for the purpose of artificial insemination violated his constitutional right of procreation.[206] The petition was denied by the district court, which found that the fundamental right to procreate does not survive incarceration.[207] The district court held that Goodwin did not have a "fundamental constitutional right to father a child through artificial insemination that survives incarceration."[208]

On appeal, the Eighth Circuit affirmed the denial of the petition by the district court, but did not reach the issue of whether the Bureau's refusal violated Goodwin's fundamental right to procreate.[209] The court assumed, without deciding, that Goodwin retained his right to procreate while incarcerated.[210] Nevertheless, it concluded that the policy of the Bureau was not subject to strict scrutiny review because of the Supreme Court's decision in *Washington v. Harper*.[211] In *Harper*, the Court held that the "proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'"[212]

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203. Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990).
204. *Id.* at 1400.
205. *Id.* at 1398 (quoting Appellant's Brief at 10) (alteration in original).
206. Goodwin v. Turner, 702 F. Supp. 1452, 1452-53 (W.D. Mo. 1988).
207. *See id.* at 1455.
208. *Id.* at 1453.
209. *Goodwin*, 908 F.2d at 1398.
210. *Id.* at 1398-99 (stating that "[e]ven assuming, without deciding, that the exercise of Goodwin's right to procreate is not fundamentally inconsistent with his status as a prisoner, the restriction imposed by the Bureau is reasonably related to achieving its legitimate penological interest," of treating all prisoners alike regardless of sex).
211. 494 U.S. 210 (1990); *see Goodwin*, 908 F.2d at 1398-99; *see also* Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 Ariz. L. Rev. 647, 692 (2000).
212. Washington v. Harper, 494 U.S 210, 223 (1990) (citation omitted). This "reasonably related" standard is the correct standard to apply (as opposed to strict scrutiny), even if the right infringed upon is a fundamental one. *Id.*

The Eighth Circuit stated that this "'reasonably related to legitimate penological interests' . . . standard must be applied even when the 'constitutional right claimed to have been infringed [upon] is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.'"[213] Goodwin was incarcerated, so a heightened level of review was unnecessary.[214] A "mere rational basis standard was the appropriate level of scrutiny to use to ascertain whether the Bureau could lawfully deny Goodwin his constitutional right to procreate."[215]

The court applied the reasonableness test as set out in *Turner v. Safley*,[216] and held that even though granting Goodwin's request would have been simple, it was acceptable to deny the request because the prohibition of insemination was rationally related to the goal of treating all inmates equally.[217] The legitimate governmental interest was to achieve equal treatment of the sexes.[218] The prison denied male prisoners access to artificial insemination because of the excessive costs that would be incurred if female prisoners were granted the same right, or, more accurately, the right to be inseminated.[219] If Goodwin's request were granted, the court reasoned, the Bureau would be forced to grant female inmates expanded medical services to accommodate pregnancies, thereby diverting resources from security and other legitimate penological interests.[220] The Eighth Circuit framed the question of equal treatment for prisoners in terms of male prisoners inseminating others versus female prisoners being inseminated by others.

In a powerful dissent in *Goodwin*,[221] Judge McMillian argued that *Skinner* and *Turner*, when read together, strongly suggest that the right to procreate survives incarceration because "'[m]arriage *and* procreation are fundamental to the very existence and survival of the race.'"[222] McMillian did not address the level of scrutiny that should be applied for this prison regulation, but, instead, argued that a blanket prohibition on artificial insemination would not pass the

213. *Goodwin*, 908 F.2d at 1398-99 (citations omitted).
214. *See* Pollack et al., *supra* note 105, at 373.
215. *Id.*
216. 482 U.S. 78 (1987).
217. The *Turner* analysis requires a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (citation omitted).
218. *Goodwin*, 908 F.2d at 1399-1400 (citing Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir. 1983)).
219. *Id.* at 1400; *see* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. Rev. 1077, 1081 (1998).
220. *Goodwin*, 908 F.2d at 1400.
221. *Id.* at 1400-07 (McMillian, J., dissenting).
222. *Id.* at 1402 (McMillian, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

constitutional muster of even the rational basis test.[223] McMillian argued that there is "little question that the procreative right survives incarceration," and reasoned that courts have "found that other privacy rights of personal choice in family matters survive incarceration and deserve protection subject to legitimate penological objectives, and there is every reason to believe that the same holds true for the right to procreation."[224] *Skinner*, argued McMillian, clearly lends support to his conclusion that the right to procreate survives incarceration.[225]

Discussing the equal treatment of prisoners, Judge McMillian stated "The equal treatment objective becomes relevant only if we accept the Bureau's speculation that granting Goodwin's novel request will lead to numerous requests by female inmates, and thus result in added financial burdens and profound administrative problems."[226] Further, McMillian maintained that, "[i]f equal treatment is a sufficient basis to deny inmates [an] otherwise accommodatable constitutional right[], then prisons would never be required to accommodate such rights because it is quite likely that any asserted right might legitimately be withheld from some inmates somewhere."[227] Like the majority, McMillian framed the equal protection claims in terms of the right to inseminate versus the right to be inseminated.

In *Anderson v. Vasquez*,[228] in an opinion similar to that of the Eighth Circuit in *Goodwin*, the district court denied death row prisoners from San Quentin the option to preserve their sperm for artificial insemination.[229] The court posited that the fundamental right to procreate is inconsistent with imprisonment and hence does not survive incarceration.[230] The Ninth Circuit affirmed the decision, but did not decide the constitutional issues, agreeing with the district court that the challenge to this policy was not ripe for consideration; there were administrative prerequisites prescribed by statute before this claim could be brought.[231]

On the state court level, the Appellate Division of the Superior Court of New Jersey decided that, even if prisoners possessed a fundamental right to procreate, security risks, scarce resources, and equal protection concerns justified a prison policy prohibiting inmate procreation through artificial insemination.[232] Percy, who was serving

223. *See id.* at 1404 (McMillian, J., dissenting).
224. *Id.* at 1402 (McMillian, J., dissenting) (citations omitted).
225. *Id.* at 1402-03 (McMillian, J., dissenting).
226. *Id.* at 1405 (McMillian, J., dissenting).
227. *Id.* (McMillian, J., dissenting)
228. 827 F. Supp. 617 (N.D. Cal. 1992).
229. *Id.* at 621.
230. *Id.* at 620-21.
231. Anderson v. Vasquez, No. 92-16631, 1994 U.S. App. LEXIS 17200, at *10 (9th Cir. July 13, 1994).
232. Percy v. N.J. Dep't of Corr., 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div.

a thirty-year sentence, requested that the prison "transport him to a nearby medical facility so that he could artificially inseminate his wife or provide him with a sterile plastic container in which to deposit his ejaculate so that his wife could swiftly transport the ejaculate outside the prison to a medical facility."[233] The court stated that "[c]onsiderable judicial deference to correction officials [was] appropriate because of the impact on guards, other inmates, prison security, and the already strained allocation of prison resources."[234] The court also pointed to equal protection concerns, stating that, "[i]f female prisoners had the right to artificial insemination, the financial burdens and security concerns would be quite significant inside the prison."[235] Similar to both the majority and dissenting opinions in *Goodwin*, the New Jersey court framed the equal protection issue as the right to inseminate another versus the right to be inseminated.[236]

While both the Eighth Circuit and the Appellate Division of the Superior Court of New Jersey were mindful of the potential equal protection claims that would arise if they allowed a male prisoner to send his sperm to his wife for artificial insemination,[237] the Ninth Circuit, in *Gerber*, seized upon the difference between the right to inseminate and the right to be inseminated, suggesting that the difference between these rights and the biological differences between men and women are exactly the reasons male and female prisoners are not similarly situated.[238] As discussed in Part II.C, the Ninth Circuit suggested that allowing male prisoners to exercise their fundamental right to procreate by artificially inseminating another is distinguishable from, and therefore consistent with, denying female prisoners their right to procreate by being inseminated by another.[239]

### C. *The Ninth Circuit Rejects Equal Protection Concerns:* Gerber v. Hickman

#### 1. *Gerber v. Hickman*: The Ninth Circuit Finds that Procreation Survives During Incarceration

Gerber, a life-term prisoner in the State of California, alleged that the California Department of Corrections denied his fundamental

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1995).

233. *Id.* at 1045.

234. *Id.* at 1046.

235. *Id.* (citation omitted).

236. *See id.*

237. *See supra* notes 203-36 and accompanying text.

238. Gerber v. Hickman, 264 F.3d 882, 890-91 (9th Cir. 2001). This decision was vacated by the Ninth Circuit and was reheard en banc on March 20, 2002. The decision by the en banc court is pending. *See* Gerber v. Hickman, 273 F.3d 843 (9th Cir. 2001); *see also infra* Part II.C.3.

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

right to procreate in violation of his Fourteenth Amendment guarantee of substantive due process.[240] Gerber requested that he be allowed to artificially inseminate his wife, because, under the California regulations, conjugal visits are prohibited for inmates sentenced to life without the possibility of parole.[241] Because of Gerber's life sentence and his wife's age, artificial insemination is the only way that they can conceive a child together.[242] Gerber requested that prison authorities allow him to send a specimen of semen to his wife, and Gerber and his wife were willing to pay all expenses for this procedure.[243] Gerber's request was denied by the prison after they determined that the procedure was not medically necessary and that Gerber had not shown that the California Department of Corrections violated any of his constitutional rights.[244] Gerber's complaint to the Eastern District of California alleged that the California Department of Corrections denied his fundamental right to procreate in violation of the Fourteenth Amendment guarantee of substantive due process.[245] The district court found that "[w]hatever right [Gerber] has to artificial insemination, it does not survive incarceration."[246]

Gerber appealed to the Ninth Circuit, "principally contend[ing] that the district court erred in concluding that the right to procreate does not survive incarceration."[247] The Ninth Circuit reversed the district court, holding that the right to procreate does survive incarceration.[248] The Warden, Rodney Hickman, cited three governmental interests that were furthered by denying Gerber the right to provide semen to his wife: the policy of treating male and female inmates in the same manner; safety risks caused by prisoners collecting semen; and concerns about the costs of litigation relating to the procedure.[249] The Ninth Circuit found that the arguments put forth by the Warden as legitimate penological reasons to restrict Gerber's exercise of his right to procreate were insufficient to justify dismissal of his complaint.[250]

The Ninth Circuit used a two-step analysis to determine whether Gerber's substantive due process rights were violated: (1) they determined whether there was a fundamental right involved, i.e., the right to procreate, and "whether that fundamental right is not 'inconsistent with [Gerber's] status as a prisoner'";[251] and (2) if they

240. *Id.* at 884.
241. *Id.*
242. *Id.*
243. *Id.* at 885.
244. *Id.*
245. Gerber v. Hickman, 103 F. Supp. 2d 1214, 1216 (E.D. Cal. 2000).
246. *Id.* at 1218.
247. *Gerber*, 264 F.3d at 884.
248. *Id.* at 892-93.
249. *Id.* at 891-92.
250. *Id.* at 892.
251. *Id.* at 886 (alterations in original) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

find that the fundamental right to procreate survives incarceration, the next step is to ask "whether there are legitimate penological interests which justify the prison's restriction of the exercise of that fundamental right."[252] In its analysis, the court stated that there is a fundamental constitutional right to procreate.[253] The court also recognized that a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[254] The court pointed to some constitutional rights that survive incarceration, including the right to free exercise of religion, the right of access to courts, the right of protection against cruel and unusual punishment, the protections of the Due Process Clause, and also the right of free speech.[255] *Turner* and *Skinner* were pivotal decisions in the Ninth Circuit's ruling that the right to procreate survives incarceration. The court noted that the *Skinner* Court's emphasis on the fundamental notion of the right to procreate lends support to their conclusion that prisoners retain some procreative rights while in prison.[256] The court stated that "[t]aken 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."[257]

The Ninth Circuit found that the contact visitation and conjugal visit cases did not preclude their finding that the right to procreate survives incarceration.[258] The court's recognition of a general right to procreate during imprisonment is not inconsistent with a holding that there is no specific right to conjugal or contact visits during imprisonment, nor with the idea that prisons can restrict the right to procreate by restricting conjugal visitation.[259] The court pointed to the use of recently developed methods and technologies that would make physical contact with the non-inmate spouse unnecessary.[260]

The first argument asserted by the Warden to justify denial of Gerber's right to procreate was that permitting male prisoners to provide semen for artificial insemination would interfere with the

252. *Id.* at 886-87 (citation omitted).

253. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Stanley v. Illinois, 405 U.S. 645, 650 (1972); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

254. *Id.* (quoting *Pell*, 417 U.S. at 822).

255. *Id.* (citations omitted); *see also supra* Part I.B..

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

257. *Id.* The court stated that *Turner* stands for an example of how a fundamental right can exist during incarceration, despite the fact that a prisoner cannot carry out a "typical" marriage while incarcerated. *Id. Skinner*, at a minimum, provides that the ability to procreate, as opposed to the opportunity to procreate, must survive incarceration. *Id.*

258. *Id.* at 890.

259. *Id.*

260. *Id.*

prison's effort to treat male and female prisoners similarly.[261] The Warden expressed concern that if male prisoners were given the right to inseminate, female prisoners would seek to be inseminated, and granting female inmates such a right would lead to "obvious" and "prohibitive" burdens.[262] The Ninth Circuit stated that the equal protection argument assumed matters not before the court, and drew a distinction between the right to artificially inseminate another and to be artificially inseminated.[263] The court found that the two sexes are not "similarly situated," and concluded that they "cannot ignore the biological differences between men and women."[264] The court concluded that the prison's policy of treating prisoners "equally to the extent possible," was not implicated in this case.[265] Interestingly, the court, in a footnote, noted that "[a] more apt parallel may be the question of whether a woman prisoner has the right to donate an egg to her lesbian partner or to a surrogate mother."[266]

The next argument posed by the Warden concerned potential safety risks caused by prisons collecting prisoner's semen.[267] The court found these concerns to be only argumentative in light of the procedural posture of the case.[268] Finally, the Warden asserted that permitting a prisoner to provide semen would create a liability risk for the prison,[269] due to the possible mishandling of semen by prison authorities or the potential litigation by female inmates seeking to be artificially inseminated.[270] The court also found this argument unpersuasive, stating that "[i]t is simply impermissible to restrict the constitutional rights of one group because of fear that another group will assert its constitutionally protected rights as well."[271] The court concluded that none of the Warden's arguments fell within the prohibition expressed in *Turner:* that a prison may only deny a

261. *Id.* at 891.

262. *Id.*

263. *Id.* (explaining that "Gerber does not seek to be artificially inseminated. That right, to be artificially inseminated, which certainly would apply to women, does not apply to Gerber and the other male prisoners").

264. *Id.*

265. *Id.* (stating "[w]omen cannot avail themselves of the opportunity Gerber narrowly seeks—to provide a semen specimen to his mate so that she can be artificially inseminated—and men cannot do what Mrs. Gerber is likely capable of doing—conceive and give birth to a child after receiving sperm from a marital partner").

266. *Id.* at 891 n.13.

267. *Id.* at 891 (arguing that "collecting semen would create an unacceptable risk that prisoners would misuse their semen by either throwing their bodily fluids on others (a process called 'gassing'), or sending their semen through the mail to individuals who do not want it").

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* Potential suits by female prisoners asserting their equal protection rights to challenge the denial of their right to artificial insemination cannot justify denying the male prisoners their constitutional right to procreate. *Id.*

constitutional right if their prison regulation is "reasonably related to legitimate penological interests."[272] The Ninth Circuit found that "there [was] no 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[273]

### 2. *Gerber v. Hickman*: The Dissent

In a stinging dissent, Judge Silverman argued that the majority opinion in *Gerber* is "[c]ontrary to all precedent,"[274] and that "[t]he majority simply does not accept the fact that there are certain downsides to being confined in prison, and that the interference with a normal family life is one of them."[275] Judge Silverman recognized that *Skinner* protects prisoners against forced sterilization, but argued that this "is a far cry from holding that inmates retain a constitutional right to procreate from prison via FedEx."[276] Silverman concluded that prisoners do not have the right to procreate while in prison because the right to procreate is "'fundamentally incompatible with imprisonment itself.'"[277]

### 3. *Gerber v. Hickman*: Reheard En Banc

The Ninth Circuit's decision in *Gerber* provoked strong reactions from legal observers.[278] The founder and former president of the conservative Pacific Legal Foundation stated, "[y]ou don't want sexual predators exercising this right," and "[y]ou don't want insane prisoners exercising it," because "if you are having lifetime criminals furthering their genes, [it is not] in the best interests of society."[279] The California Attorney General's office said this ruling has "cast the lower courts into hopeless conflict, created a right that is unprecedented under Supreme Court case law, and triggered ramifications that will far exceed the bounds of the case."[280] The California Attorney General said that one of the legal problems created by the Ninth Circuit's ruling in *Gerber* is the availability of the same rights for female inmates.[281] Other editorial columns also have

272. *Id.* at 892 (quoting Turner v. Safley, 482 U.S. 78, 89 (1997)).
273. *Id.*
274. *Id.* at 893 (Silverman, J., dissenting).
275. *Id.* (Silverman, J., dissenting).
276. *Id.* (Silverman, J., dissenting).
277. *Id.* at 894 (Silverman, J., dissenting) (citations omitted).
278. Greg Krikorian, *Judges Back Procreation By Inmates: Male Prisoners Have Right to Use Artificial Insemination to Sire Offspring, Ruling Says*, L.A. Times, Sept. 6, 2001, at A1.
279. *Id.*
280. Greg Krikorian, *State Fights Procreation for Prison Inmates Courts: Lockyer Moves to Block an Appellate Ruling on Artificial Insemination, Saying the U.S. Supreme Court Should Decide Case*, L.A. Times, Sept. 13, 2001, at B1.
281. *Id.*

pointed to the potential equal protection problems arising from claims that may be brought by female prisoners based on the Ninth Circuit's decision.[282] One columnist went so far as to question the mental competency of the Ninth Circuit judges.[283]

Conversely, counsel for the National Prison Project of the American Civil Liberties Union stated, "[a] prisoner's procreative rights . . . are not extinguished when he passes through prison walls," and "[w]e don't support eugenics in this country. We don't support sterilizing people that we don't think are worthy of having children."[284]

The three-judge panel opinion in *Gerber* was vacated by a majority of nonrecused regular active judges of the Ninth Circuit,[285] pending a rehearing by the en banc court pursuant to Circuit Rule 35-3.[286] On March 20, 2002, the en banc court of the Ninth Circuit heard oral arguments on the issue of whether a prisoner has the fundamental right to procreate while incarcerated. The decision of the court is pending.

## III. THE FUNDAMENTAL RIGHT TO PROCREATE EXISTS DURING INCARCERATION FOR MALE *AND* FEMALE PRISONERS

This part argues that the fundamental right to procreate survives incarceration. The Due Process Clause of the Fourteenth Amendment protects this right, and prohibition of a prisoner's right to procreate will not survive the "reasonably related" standard applied in *Turner*.[287] Further, the constitutional right to procreate of the non-inmate spouse should be protected. Most importantly, analyzed under an intermediate level of scrutiny, this right should be protected equally as between male and female prisoners. Women prisoners who are incarcerated during their reproductive years are at risk of being sterilized by a prison regulation that does not allow them to preserve their fertility by utilizing ART to freeze embryos for use upon their release from custody.

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282. *See, e.g.*, George F. Will, *Court Is California Silly Over Procreation*, The Augusta Chron., Nov. 14, 2001, at A5.

283. Editorial, *9th Court Goes Nuts*, The Augusta Chron., Nov. 12, 2001, at A4 ("[T]he court's workload is so heavy it has put in jeopardy the judges' states of mind. Only a judge who has taken leave of his or her senses would come to the conclusion that convicts . . . [should] get the privilege and responsibilities that come with being a parent.").

284. Krikorian, *supra* note 278, at A1.

285. Gerber v. Hickman, 273 F.3d 843 (9th Cir. 2001).

286. 9th Cir. R. 35-3, http://www.ca9.uscourts.gov (last visited Apr. 16, 2002) (Ninth Circuit Rule 35-3 deals with procedure for en banc hearings).

287. *See supra* Part I.B.

### A. *The Right To Procreate Survives Incarceration*

#### 1. Denying Male Prisoners the Right To Procreate Is Not Reasonably Related to any Legitimate Penological Interest

The Due Process Clause of the Fourteenth Amendment was intended to protect individuals against unfair deprivations of their liberties.[288] Denying prisoners their fundamental procreative liberties violates substantive due process. Case law has established that the right to procreate is a fundamental right "implicit in the concept of ordered liberty,"[289] and "one of the basic civil rights of man."[290] Although any attempt by the government to infringe a fundamental right must be narrowly tailored to serve a compelling state interest,[291] it is necessary to limit prisoners' rights to those not inconsistent with imprisonment.[292] Under the case law, the proper standard for determining the validity of a prison regulation that infringes on a constitutional right is to determine if the regulation is "reasonably related to legitimate penological interests."[293]

Courts have found that many other constitutional rights survive incarceration, including the right to marriage,[294] the right to free exercise of religion,[295] and the right of free speech.[296] Similarly, the right to procreate through ART methods is not inherently inconsistent with an individual's status as a prisoner, or with the legitimate penological objectives of the corrections system. Although there is a great amount of deference given by the courts to prison officials with respect to prisoners' constitutional rights,[297] prohibitions on conjugal visitations "directly infringe[] upon the procreational rights of prisoners, leaving artificial insemination perhaps the only way to preserve inmates' fundamental right to procreate."[298]

The *Turner* Court found that, taking into account the limitations imposed by prison life, many of the aspects of a marriage remain.[299] A

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288. *See supra* Part I.A.

289. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (citations omitted).

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

291. *See supra* Part I.A.

292. *See supra* Part I.B.

293. *See supra* Part I.B.

294. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987).

295. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

296. *See, e.g.*,, Pell v. Procunier, 417 U.S. 817 (1974).

297. *See* Pollack, et al. *supra* note 105, at 370 (explaining that deference given by the courts to prison officials is demonstrated by the fact that conjugal visits with spouses have never been deemed a constitutional right (citing Thomas M. Bates, Note, *Rethinking Conjugal Visitation in Light of the "AIDS" Crisis*, 15 New Eng. J. on Crim. & Civ. Confinement 121 (1989))).

298. *Id.* at 371.

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

married couple's decision whether or not to conceive a child is at the heart of the right to privacy protected by the Fourteenth Amendment.[300] Due to relatively recent technological developments, procreative liberties shared by prisoners and their non-inmate spouses, which are "fundamental to the very existence and survival of the race,"[301] can be another aspect of marriage protected without inhibiting any legitimate penological interests.

The *Turner* Court applied a four-part analysis to determine if a prison regulation is "reasonably related to legitimate penological interests."[302] First, a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forth to justify it" is required.[303] ART requires no contact visitation or conjugal visitation. Denying a male prisoner access to a plastic container in which to deposit his semen and then passing that container to his non-inmate wife is not rationally connected to any legitimate penological interest. Although permitting a prisoner to provide a semen specimen may increase the risk of liability for the prison, either because of mishandling of the specimen by prison authorities or suits by women inmates seeking to exercise their fundamental right to procreate, as the Ninth Circuit stated in *Gerber*, "it is generally reprehensible to suggest that restricting protected fundamental constitutional rights is justified by fear of increasing a party's liability."[304] More importantly, prison security, perhaps the most important objective of the penal system, would not be threatened by this procedure, because no contact between the male prisoner and his non-inmate spouse is required. No legitimate penological interest exists because, under *Skinner*, depriving prisoners of procreative liberties for deterrence, retribution, and correction purposes is simply not legitimate.

Second, *Turner* states that where the prisoner retains alternative means of exercising the right, courts should be especially deferential to corrections officials. It is well established that prisoners do not have a constitutional right to conjugal visitation or contact visitation.[305] This obviously prevents prisoners from exercising their right to procreate via coital reproduction. There is no alternative means besides ART for prisoners to exercise their fundamental right to procreate. Therefore, courts do not need to be "particularly conscious" of deferring to prison officials who implement regulations that prohibit a prisoner from exercising his fundamental right to procreate.

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300. *See supra* Part I.A.

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

302. *See supra* Part I.B.

303. *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)); *see supra* Part I.B.

304. Gerber v. Hickman, 264 F.3d 882, 891-92 (9th Cir.), *vacated*, 273 F.3d 843 (9th Cir. 2001).

305. *See supra* Part II.A.

Third, a court must consider "the impact of accommodation of the asserted constitutional right . . . on guards and other inmates, and on the allocation of prison resources generally."[306] For male prisoners, the cost of protecting their fundamental right to procreate is minimal. The "procedure" necessary for collecting the semen from the prisoner is negligible; a plastic container is all that is required, timed correctly with a visit from the prisoner's spouse. The impact that protecting this right to procreate would have on female prisoners and the costs associated with female prisoners exercising their right to procreate is discussed below.[307]

Finally, *Turner* states that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[308] Here, there *is* an alternative to the blanket prohibition on prisoners right to procreate. As stated in *Turner*, "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."[309] In this case, the alternative to prohibiting male prisoners from exercising their procreative rights is allowing them to provide semen to their spouses at a minimal cost to the prison system: this is definitive evidence that there is no rational and reasonable relationship between legitimate penological interests and prison regulation infringing a prisoner's right to procreate. Although a court may decide to apply a more stringent standard than the one applied in *Turner*,[310] even using a low standard of scrutiny that provides a high level of deference to prison authorities, a blanket prohibition of a prisoner's right to procreate should be defeated.

Critics of the Ninth Circuit's decision in *Gerber* argue that it is not in the best interest of society to "hav[e] lifetime criminals furthering their genes."[311] This argument is unfounded and unethical. In his concurrence in *Skinner*, Justice Jackson stated that the "plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and . . . are uncertain as to transmissibility presents other constitutional questions of gravity."[312] Jackson recognized that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes."[313] Denying prisoner the right to procreate

306. *Turner*, 482 U.S. at 89-90.
307. *See infra* Part III.B.
308. *Turner*, 482 U.S. at 90; *see supra* Part I.B.
309. *Turner*, 482 U.S. at 91.
310. *See supra* Part II.B.
311. Krikorian, *supra* note 278; *see supra* Part II.C.3.
312. Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J. concurring).
313. *Id.*

will effectively sterilize them, which, "[i]n evil or reckless hands ... can cause races or types which are inimical to the dominant group to wither and disappear."[314] Eugenics is not a valid justification for denying prisoners their procreative rights.

Although courts should be deferential to prison officials with respect to issues dealing with prison administration, courts should be compelled to respond when prison officials deny prisoners those constitutional rights not inconsistent with their status as prisoners. Procreation utilizing ART is one of those rights.

### 2. The Rights of the Non-Inmate Spouse

A restriction on prisoner's rights also constitutes an infringement on the right of the non-prisoner spouse.[315] The Supreme Court, in *Procunier v. Martinez*, used this approach to invalidate restrictions on prisoners' mail.[316] In *Procunier*, the prison employees screened both incoming and outgoing mail for violations of prison regulations prohibiting any writings or voice recordings expressing inflammatory political, racial, religious, or other views or beliefs.[317] The Court determined that because the rules of the prison implicated First Amendment rights, there could not be complete deference by the courts to the prison officials; the Court was "mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."[318] The Court determined that the regulation prohibiting speech failed to further an important penological interest, and the regulation allowing for censorship of the prisoner's mail was broader than the legitimate interest warranted.[319] Furthermore, the Court found that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him .... [C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners."[320]

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314. *Id.* at 541.

315. *See generally* Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275 (1985) (arguing that courts should consider the effects on the spouse's rights when reviewing the constitutionality of a prison regulation).

316. Procunier v. Martinez, 416 U.S. 396 (1974). *Procunier* was subsequently overruled on other grounds. *See* Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (implying that incarceration logically deprives an inmate and family of freedom "to form the ... enduring attachments of normal life"); *see generally* Davis, *supra* note 96, at 174-75.

317. *Procunier*, 416 U.S. at 399-400.

318. *Id.* at 404.

319. *Id.* at 415.

320. *Id.* at 409.

In *Goodwin*, the appellant prisoner argued that the Bureau of Prisons' blanket prohibition of artificial insemination directly affected the procreation rights of his non-prisoner wife, and that the restriction should be viewed under a heightened level of scrutiny.[321] Despite the Supreme Court's decision in *Procunier*, the Eighth Circuit deemed the wife's rights irrelevant to its determination and instead adopted the *Turner* analysis, which set out the guidelines for determining reasonableness.[322]

The constitutional rights of non-inmate spouses should be considered as a factor when determining whether prisoners have the right to procreate while incarcerated. The non-prisoner spouse's fundamental right to procreate is abridged by prison regulations that do not allow prisoners to take advantage of advances in reproductive technology. Not allowing the non-inmate spouse to procreate with their incarcerated spouse punishes the innocent non-inmate, and strips them of a fundamental liberty guaranteed by the Fourteenth Amendment. Furthermore, denying prisoners the right to procreate places their non-incarcerated spouse in a difficult bind; the non-inmate spouse must either forfeit his or her own fundamental right to procreate, or stray outside the bonds of marriage to exercise those procreative rights. The Supreme Court has not addressed the issue of adultery directly, yet, in dicta, the Court has indicated that criminal adultery statutes would be viewed by the Court as constitutional.[323] Although state adultery laws are rarely enforced, a desperate non-inmate spouse may be tempted to violate these criminal statutes in order to exercise his or her rights that are supposedly protected by the Constitution. An innocent non-inmate spouse who respects both the marital vows and the state criminal statutes will be forced to sacrifice his or her right to have children. By allowing male prisoners to send their semen to their wives, procreative liberties guaranteed by the Fourteenth Amendment can be protected for both the prisoner and the non-prisoner spouse.[324]

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321. Goodwin v. Turner, 908 F.2d 1395, 1399 (8th Cir. 1990).

322. Turner v. Safley, 482 U.S. 78, 89-91 (1981).

323. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) ("[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (stating that the decision did not effect Connecticut's adultery statutes, "the constitutionality of which is beyond doubt"); Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (stating that he is not suggesting that "adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced").

324. Arguably, under *Eisenstadt*, the procreative rights of a prisoner and a non-incarcerated, non-marital heterosexual partner would also be protected. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

### B. *Female Prisoners' Right to Procreate Should Be Preserved via ART During Incarceration*

"The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.... There is no redemption for the individual whom the law touches.... [She] is forever deprived of a basic liberty."[325] Female prisoners, incarcerated during their reproductive years, are effectively sterilized by the deprivation of the right to harvest their eggs for use with a gestational carrier or when released from custody. This sterilization is exactly the kind of "punishment" *Skinner* prohibited. The Supreme Court in *Skinner* stated that prisoners have a constitutional right to maintain their procreative abilities for use once released from custody.[326] Female prisoners have a particularly persuasive reason for seeking to harvest their viable eggs. The older a woman becomes, the less likely that she will produce viable eggs.[327] If a woman is imprisoned from age twenty-five to age forty-five, for example, her chances of conceiving via coital reproduction are significantly reduced, if not completely extinguished.[328] Furthermore, birth defect rates increase as the age of the mother increases.[329] Although egg harvesting is slightly more complicated and costly than sperm donation,[330] the interest in the case of a woman is particularly compelling because of her lack of fertility at an older age.

#### 1. The Equal Protection Analysis: Male and Female Prisoners Should Be Treated Equally With Respect to Their Procreative Liberties

In *Goodwin*, the Eighth Circuit denied male prisoners their fundamental right to procreate because of the policy of treating all inmates equally.[331] Yet the court incorrectly compared the right of a male prisoner to inseminate another with the right of a female

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

326. *Id.* at 536.

327. *See* Kimberly E. Diamond, *Cryogenics, Frozen Embryos and the Need for New Means of Regulation: Why the U.S. Is Frozen in its Current Approach*, 11 N.Y. Int'l L. Rev. 77, 81 n.23 (1998) (stating that a "healthy wom[a]n ... only ha[s] the potentiality of releasing a maximum of between 400 and 500 eggs over the course of her lifetime. For this reason, by the time a woman is in her mid-40s, her chances of becoming pregnant naturally through her own menstrual cycle become very slim" (citation omitted)).

328. *Id.*

329. *See generally*, Hutton Brown, et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 Vand. L. Rev. 597, 743 (1986) (discussing a New York state wrongful birth case in which the court permitted the parents of a child born with Down's Syndrome to recover from the doctor who negligently failed to inform them that the mother's age increased the probability of this defect).

330. *See supra* note 4 (discussing a typical IVF procedure).

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

prisoner to be inseminated. It is unlikely that any court would uphold a female prisoner's right to become impregnated through artificial insemination while incarcerated; the security risks and costs would be too substantial, and any regulation prohibiting female prisoners from becoming pregnant would certainly be "reasonably related to legitimate penological interests" as set out in *Turner*.[332] Although there is some indication from case law that conjugal visits and childbirth are not inherently inconsistent with an individual's status as a prisoner,[333] a female prisoner's right to be inseminated while incarcerated is beyond the scope of this Note. The Eighth Circuit should have compared the right of male prisoners to donate their sperm to their wives for artificial insemination with the right of female prisoners to donate their eggs for use with either a gestational carrier or to freeze as embryos, to use upon their release from prison. There is a greater parallel between sperm donation and egg donation.

The Ninth Circuit hinted at this potential equal protection problem in a footnote in *Gerber*.[334] The court recognized that "[a] more apt parallel [to a male prisoner artificially inseminating another] may be the question of whether a woman prisoner has the right to donate an egg to her lesbian partner or to a surrogate mother."[335] Although both the Eighth and Ninth Circuits seemed willing to acknowledge that there is a right to procreate while incarcerated, they seemed reluctant to recognize this right due to the fact that the right to be inseminated cannot reasonably be extended to female prisoners. Such reluctance by the courts was clearly misplaced, because both courts have misconstrued the issue. The right to inseminate and the right to be inseminated are clearly not parallel. If artificial insemination is compared instead with egg donation, the equal protection concerns of the Eighth and Ninth Circuits would be alleviated.

In an equal protection claim, it must be demonstrated that "a person is similarly situated to those persons who allegedly received favorable treatment."[336] The Supreme Court needs to settle the issue of male and female prisoners being "similarly situated" and hold that women cannot be discriminated against with respect to prison

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332. Turner v. Safley, 482 U.S. 78, 89 (1987).

333. *See* Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001). The Ninth Circuit points to two California statutes to support its contention that conjugal visitation and childbirth are not necessarily inconsistent with an individual's status as a prisoner. Cal. Code Regs. tit. 15, § 3174 (2001) (regulation regarding family overnight visits for prisoners); Cal. Code Regs. tit. 15, § 3074.3 (rehabilitation program for parenting or pregnant prisoners); *see also In re* Cummings, 640 P.2d 1101, 1101 (Cal. 1982) (discussing prison's overnight family visitation policy); *In re* Monica C., 36 Cal. Rptr. 2d 910, 911 (Ct. App. 1995) (discussing appellant's birth of child in prison).

334. *Gerber*, 264 F.3d at 891 n.13.

335. *Id.*

336. Women Prisoners v. Dist. of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996) (citations omitted).

regulations.[337] Female prisoners commit the same crimes as male prisoners, and serve the same time. Female prisoners are "similarly situated" to male prisoners, and therefore, their procreative rights should be equally protected.

Gender has never been recognized by the Court as a suspect classification.[338] Therefore, under a suspect classification analysis, any regulation prohibiting female inmates' rights, which male prisoners are allowed, would be subject to intermediate scrutiny rather than strict scrutiny.[339] Because the right to procreate is a fundamental right, however, any regulation infringing upon this right would undergo a strict scrutiny analysis. Male and female prisoners, sentenced to the same quality offense, cannot be treated unequally. Following the equal protection analysis of *Skinner*, a court would be bound to hold, applying strict scrutiny, that any law that "lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one but not the other, . . . has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[340] Not allowing female inmates to harvest their eggs, therefore, is effective sterilization, and *Skinner* prohibits persons sentenced to the same crime to be punished unequally.

### 2. The Substantive Due Process Analysis: Protecting Female Inmates' Right To Procreate by ART Passes the *Turner* Test

The strict scrutiny standard applied to infringements on fundamental rights may be overcome if the government can show that there is a "compelling" governmental interest that is "narrowly tailored" to advance the state's objectives.[341] Yet the proper standard for determining if a prison regulation is valid under a substantive due process analysis is the "reasonably related to legitimate penological interests" test applied in *Turner*.[342] First, the regulation prohibiting ART for female inmates must have a "valid, rational connection" to the legitimate governmental interest that is put forth to justify it.[343] Although there may be strong arguments for disallowing female prisoners to become pregnant while incarcerated, this reasoning is not persuasive when the method used to preserve procreation is ART.

Second, if there is an alternative means of exercising the prisoner's rights, the court should be particularly deferential to prison authorities. It is obvious that, aside from being artificially

337. *See supra* Part I.C.
338. *See supra* Part I.C.
339. *See supra* Part I.C.
340. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (citation omitted).
341. *See* Roe v. Wade, 410 U.S. 113, 152-55 (1973); *see also supra* Part I.A.
342. Turner v. Safley, 482 U.S. 78, 89 (1987); *see also supra* Part I.B., III.A.
343. *Turner*, 482 U.S. at 89.

inseminated, there is no other way for female prisoners to protect their right to procreate, unless they use ART. Access to the ART procedure could be limited to female prisoners whose sentences are of such lengths that ART is necessary to ensure the possibility of conception. Prison authorities or courts considering a prisoner's request for ART may consider the age and circumstances of both the prisoner and her non-inmate spouse to determine the necessity of the procedure in preserving the right to procreate.

Third, the impact on other prisoners and the allocation of prison resources must also be considered. The average price of one cycle of ART is typically $8,000 to $11,000.[344] IVF is an elective procedure that female prisoners should be able to undergo in order to preserve their right to procreate. Forcing the prison system to absorb these high costs may have a negative impact on prison resources. However, limiting the procedure to female prisoners whose right to procreate will be effectively extinguished without ART and requiring that the prisoner and her non-inmate spouse finance the procedure would solve the problem of allocation of prison resources.

Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. The alternative to prohibiting female prisoners from procreating is to allow these women to harvest their eggs and preserve their fertility. Although the procedure is costly and slightly more time intensive than a male prisoner providing his semen to his wife, ART through IVF is the only alternative to sterilizing females incarcerated during their prime reproductive years.

## CONCLUSION

Despite the severe limitations placed on prisoners during their incarceration, there is no "iron curtain" between prison and the Constitution. Prisoners should be allowed to exercise all rights that are not inconsistent with their status as prisoners. Allowing a male prisoner to deposit his semen into a plastic container, which is then transported out of the prison doors, is not inconsistent with his status as a prisoner. There is no valid, rational connection between a prison regulation that prevents this and a legitimate governmental interest. Although pregnancy within a prison may be inconsistent with a female prisoner's status as a prisoner, allowing a woman to preserve her right to procreate by freezing embryos is not inconsistent with her status as a prisoner; it preserves her fundamental rights. Any other result would effectively sterilize women who are incarcerated during their prime reproductive years.

344. *See* Yamamoto & Moore, *supra* note 4, at 102.