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Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women

Jaime Escuder

The United States Constitution protects citizens from being denied certain fundamental rights and liberties. Included among these are the right to be free from discrimination, the right to be childless, the right to marry whomever one pleases and the right to procreate. Courts have a "constitutional responsibility to delineate and protect [these] fundamental liberties."

Although states may not deny citizens these liberties outright, they may curtail them significantly in the prison setting. Indeed, states may completely deny some of these rights to their prisoners. Nonetheless, a prisoner is entitled to exercise all of the

1 B.M. 2000, Florida State University; J.D. Candidate 2003, University of Chicago
2 See, for example, Yick Wo v Hopkins, 118 US 356, 373 (1886) (finding a regulation invalid because it "amount[ed] to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States").
3 See, for example, Roe v Wade, 410 US 113, 16 (1973) (recognizing a woman's right to have an abortion free from state interference during the first trimester).
4 See, for example, Loving v Virginia, 388 US 1, 12 (1967) (finding a statute prohibiting interracial marriage to be unconstitutional).
5 See, for example, Skinner v Oklahoma, 316 US 535, 541 (1942) (describing the ability to procreate as "one of the basic civil rights of man").
7 See Bell v Wolfish, 441 US 520, 545–46 (1979) (holding several prison policies to be constitutional).
8 See, for example, Jones v Helms, 452 US 412, 419 (1981) (finding that prisoners are not entitled to enjoy the fundamental right of travel).
constitutional rights that are consistent with her status "as a prisoner" and that are in accord with "the legitimate penological objectives of the corrections system." This is true even when the prisoner's incarceration prevents her from enjoying those rights fully.

This Comment addresses whether the Constitution requires prisons to make reasonable efforts to accommodate an inmate's right to procreate. While this question has been addressed in the federal appellate courts, these courts have primarily considered the issue only as it pertains to male inmates. This Comment proposes that the right to procreate does survive incarceration and that equal protection analysis requires that the right be extended to women as well as men.

Part I of the Comment analyzes case law pertaining to a prisoner's right to procreate. It begins by briefly examining Supreme Court cases that have established procreation as a fundamental right. Part I then discusses cases that have upheld the exercise of other fundamental rights in the prison setting, as well as cases that have specifically addressed whether the right to procreate survives incarceration. Finally, Part I considers cases that have addressed the issue of gender classification.

Part II argues that, like other fundamental rights, such as marriage, a state may not deny the right to procreate to its prisoners. Furthermore, the Comment argues that the Equal Protection Clause of the Fourteenth Amendment requires states to extend this right to female prisoners. A two-pronged approach is used to make this argument. First, Part II contends that the right to procreate does survive incarceration. Second, Part II explains why, assuming that male prisoners have a right to procreate, the Equal Protection Clause mandates that female prisoners be allowed to exercise this right as well.

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8 Pell, 417 US at 822.
9 See, for example, Turner v Safley, 482 US 78, 95–96 (1987) (finding that states may not deny prisoners the right of marriage even though the prison setting necessarily curtails some major benefits of that right).
10 See, for example, Gerber v Hickman, 264 F3d 882, 891 (9th Cir 2001), revd en banc, 291 F3d 617 (2002) (refusing to address the question of female inmate procreation on the ground that "[w]omen cannot avail themselves of the opportunity [plaintiff] narrowly seeks—to provide a semen specimen to his mate so that she can be artificially inseminated").
I. Analysis of Law Concerning Prisoners and the Right to Procreate

This part of the Comment provides an overview of the case law that is relevant to a claim that the right for both men and women to procreate survives incarceration. Section A discusses Supreme Court decisions that establish procreation as a fundamental right. Section B addresses instances in which courts have considered the extent to which certain fundamental rights may be enjoyed in prison. Section C discusses court decisions specifically concerning procreation in prison. Finally, Section D demonstrates how Supreme Court decisions require that male and female inmates be treated equally.

A. Procreation as a Fundamental Right

Procreation is a constitutionally protected right.11 The Supreme Court has placed the right to make decisions regarding procreation “on the same level of importance as decisions relating to [marriage], childbirth, child rearing and family relationships.”12 Like marriage, it is therefore “of fundamental importance for all individuals.”13

In Eisenstadt v Baird,14 the Court found that the right of privacy prevents the government from unduly interfering with an individual’s decisions regarding procreation.15 Eisenstadt dealt with a Massachusetts statute preventing certain individuals (such as physicians) from giving contraceptive materials to unmarried persons.16 The appellee in Eisenstadt was convicted under this statute after exhibiting and distributing contraceptive articles to college students.17 The Supreme Court affirmed the First Circuit’s ruling that the statute was unconstitutional.18 The Court found that the statute impermissibly conflicted with the Equal Protection Clause because it allowed the distribution of

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11 See, for example, Carey v Population Services International, 431 US 678, 687 (1977) (finding that “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State”).
13 Id at 384.
15 Id at 453.
16 Id at 441–42.
17 Id at 440.
18 See Eisenstadt, 405 US at 454–55 (holding that “by providing dissimilar treatment for married and unmarried persons who are similarly situated [the laws in question] violate the Equal Protection Clause”).
contraceptive materials to married couples, but prohibited such distribution to unmarried couples. The Court also found that the statute interfered with the privacy rights of both married and unmarried persons.

The Supreme Court has also ruled that in many cases, statutes prohibiting the distribution of contraceptive devices to minors are unconstitutional. In Carey v Population Services International, the Court noted that the decision whether or not to procreate is "at the very heart of [a] cluster of constitutionally protected choices" upon which the government may not infringe. The government may only burden a fundamental right when such action is justified by a "sufficiently compelling state interest." Even then, the regulation "must be narrowly drawn to express only those interests." The Supreme Court therefore has consistently recognized procreation as a fundamental right that states only can infringe upon in exceptional circumstances.

B. Fundamental Rights in Prison

Prisoners retain many rights while they are incarcerated. Nonetheless, incarceration indisputably necessitates restricting and limiting some of these rights. A state's ability to curtail a prisoner's rights depends on whether the restriction serves valid

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19 Id at 453 ("If under Griswold v Connecticut, 381 US 479 (1965) the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.").

20 See id ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

21 See Carey, 431 US at 681 (finding unconstitutional a New York statute prohibiting sales of contraceptives to minors).


23 Id at 685.

24 See id at 686 (stating that "even a burdensome regulation may be validated by a sufficiently compelling state interest"). See also Roe v Wade, 410 US 113, 154 (1973) (finding that certain state interests, such as "safeguarding health, . . . maintaining medical standards, and . . . protecting potential life," may become sufficiently compelling to allow a state to infringe on the right to an abortion).

25 Id.

26 See, for example, Wolff v McDonnell, 418 US 539, 555–56 (1974) (finding that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country").

27 See Bell v Wolfish, 441 US 520, 545 (1979) (stating that "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations").
penological interests. When determining the validity of penological interests, courts have been hesitant to undermine the judgment of prison officials. This has been true even in instances where prison officials have sought to curtail fundamental liberties in the prison setting. In Bell v Wolfish, for example, the Supreme Court upheld the constitutionality of several practices employed at a custodial facility in New York City. These practices included a requirement that inmates undergo a visual body cavity search after every contact visit with a person from outside the prison, including visits with the prisoners’ own defense attorneys. The Court ruled that the prison could constitutionally perform these searches on both prisoners and pretrial detainees.

Bell shows that while constitutional rights are to be “scrupulously observed,” courts understand that the everyday problems of running a corrections facility are not easily resolved. As a result, courts have held that it is proper to accord prison administrators “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.”

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28 See, for example, Pell v Procunier, 417 US 817, 822 (1974) (finding that a prisoner is entitled to retain those First Amendment rights “that are not inconsistent with [her] status as a prisoner or with the legitimate penological objectives of the corrections system”).
29 See, for example, Pitts v Thornburgh, 866 F2d 1450, 1453 (DC Cir 1989) (stating that “courts should be loath to substitute their judgment for that of prison officials and administrators”).
30 See, for example, Jones v North Carolina Prisoners’ Labor Union, Inc, 433 US 119, 125 (1977) (stating that “this Court has long recognized that ‘[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system’”), quoting Price v Johnston, 334 US 266, 285 (1948).
32 Id at 523.
33 Id at 577 (Marshall dissenting).
34 Id at 558 (stating that “assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility . . . we nonetheless conclude that these searches do not violate that amendment”) (internal citations omitted).
35 Bell, 441 US at 562.
36 See id at 547 (recognizing that “the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions”). See also Turner v Safley, 482 US 78, 84–85 (1987) (recognizing that “[r]unning a prison is an inordinately difficult undertaking”).
37 Bell, 441 US at 547.
Of course, this deference does not require courts to blindly accept the conclusions of prison administrators. On the contrary, courts have a duty to examine contested prison regulations, ensuring that they do not violate fundamental liberties. In *Bradbury v Wainright*, the Eleventh Circuit questioned the validity of a regulation promulgated by the Florida Department of Corrections that, among other things, prevented prisoners serving life sentences from marrying. The Eleventh Circuit overturned the district court’s grant of summary judgment in favor of the state, observing that the security justifications that the state put forth were “extremely weak.”

One of the most significant cases concerning the fundamental rights of prisoners is *Turner v Safley*, in which the Supreme Court established the current constitutional standard for restricting prisoners’ rights. *Turner* considered a statute similar to the one at issue in *Bradbury* and determined that states may not deny prisoners the right to marry. The Court reviewed the Eighth Circuit’s holding that courts should apply strict scrutiny when assessing certain prison regulations. The *Turner* Court rejected this finding on two grounds. First, the Court held that subjecting the judgments of prison officials to strict scrutiny would interfere with “their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” Second, the Court found that requiring strict scrutiny in prison cases would “distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.”

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38 See, for example, *Bradbury v Wainright*, 718 F2d 1538, 1543 (11th Cir 1983) (stating that “prison administrators’ bald assertions of security interests will not justify the loss of a prisoner’s fundamental rights”).
39 See *Pell*, 417 US at 827 (stating that courts may not “abdicate their constitutional responsibility to delineate and protect fundamental liberties”).
40 718 F2d 1538 (11th Cir 1983).
41 See id at 1539 (“Th[is] following inmates are not permitted to marry . . . [i]nmates under sentence of life imprisonment and required to serve no less than twenty-five (25) years before becoming eligible for parole”) (quoting Fla Dept of Corrections Rule 33-3.13).
42 Id at 1544–45.
44 Id at 99.
46 *Turner*, 482 US at 89.
47 Id.
ognizing that prison administration is a difficult task, the court adopted a form of rational basis review for infringements on the fundamental rights of prisoners. Specifically, the Court held that "when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\textsuperscript{48}

In order to determine the reasonableness of a prison regulation, the Court suggested that courts look at four factors. First, courts should consider whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."\textsuperscript{49} Second, courts should determine whether "alternative means of exercising the right . . . remain open to prison inmates."\textsuperscript{50} Third, courts should consider the impact that accommodating the asserted constitutional right "will have on guards and other inmates, and on the allocation of prison resources generally."\textsuperscript{51} Finally, "the absence of ready alternatives is evidence of the reasonableness of [the] prison regulation."\textsuperscript{52} The converse is also true: "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable."\textsuperscript{53} While these factors do not represent a test that courts must apply in cases concerning prisoner’s fundamental rights, the Turner court mentioned them because they are "relevant in determining the reasonableness of the regulation at issue."\textsuperscript{54}

In the case before it, the Turner Court found that the regulation was not reasonable.\textsuperscript{55} While the Court recognized that the prison setting necessarily limits many of the benefits of marriage, it found that prisoners may still enjoy important aspects of the right, such as "expressions of emotional support and public commitment."\textsuperscript{56} The Court also found that the restriction was not reasonable because "[t]here are obvious, easy alternatives to the . . . regulation that accommodate the right to marry while imposing a de minimis burden on the pursuit of security objectives."\textsuperscript{57} Thus, the Turner Court established that while courts should not exam-
prison regulations under strict scrutiny, a regulation will be upheld only if it is reasonably related to legitimate penological interests.

An obvious tension exists in cases that, like Turner and Bell, attempt to define the scope of constitutional liberties in the prison setting. On the one hand, courts want prisoners to enjoy their fundamental rights, but on the other hand, judges do not want to prevent prison officials from maintaining a safe and secure prison environment. Courts have approached this tension by reviewing grievances on a case-by-case basis and, when in doubt, resolving the issue in favor of the prison administrators. The judiciary has stubbornly refused to hold that prisoners have no rights, however, and has struggled to develop a workable and constitutionally acceptable system. Decisions subsequent to Turner, for example, have further clarified the extent to which prisoners may enjoy the marriage right in prison. Such decisions, which attempt to combine fundamental freedoms with the realities of life in the prison system, reveal the judicial belief that a prison setting should be capable of both housing inmates and realizing constitutional liberties.

C. Procreation in Prison

1. A state’s policy of inmate sterilization merits strict scrutiny.

The principal Supreme Court case outlining the extent to which the government may involve itself with matters concerning procreation and prisoners is Skinner v Oklahoma. There, the Court examined a statute that required the sterilization of persons convicted two or more times for “crimes amounting to felonies involving moral turpitude.” The plaintiff in Skinner had been convicted under this statute and, as a result, faced sterilization because of a jury’s determination that the procedure would

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58 See, for example, Bell, 441 US at 547 (stating that prison administrators “should be accorded wide-ranging deference in the adoption and execution of policies”).
59 See, for example, Hernandez v Coughlin, 18 F3d 133, 137 (2d Cir 1994) (finding that while prisoners have a right to be married, they do not have a right to conjugal visits while incarcerated).
60 316 US 535 (1942).
61 Id at 536.
not jeopardize the plaintiff's health. The Oklahoma Supreme Court upheld the jury's finding.

The Supreme Court reversed the decision of the Oklahoma court, declaring the statute to be unconstitutional. The Court found the legislation to run "afoul" of the Equal Protection Clause because it required the sterilization of those who had committed certain crimes, such as grand larceny, but provided immunity for those who had committed other similar crimes, such as embezzlement. The Court found 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 discrimination as if it had selected a particular race or nationality for oppressive treatment."

The Court was also keenly aware that the statute made it possible for the state to destroy an extremely important right. Referring to procreation as "one of the basic civil rights of man," and "a basic liberty," the Court found that where a sterilization law is at issue, strict scrutiny is "essential." This is because such laws run the risk of allowing the state to discriminate against certain groups of individuals, preventing them from enjoying their fundamental rights.

This finding is not at odds with the Court's subsequent ruling in Turner that strict scrutiny is not appropriate when assessing prison regulations, because Turner did not deal with the issue of sterilization. The Skinner Court recognized that a state may use sterilization laws to discriminate against "groups or types of individuals in violation of the constitutional guaranty of just and equal laws." In fact, this was the case in Skinner, where the law laid "an unequal hand on those who [had] committed intrinsically the same quality of offense." The Court undoubtedly recognized

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62 Id at 537 (stating that "[t]he court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude, and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health").
63 Id at 537.
64 Skinner, 316 US at 543.
65 See id at 541.
66 Id at 541.
67 See id at 536 (stating that "[t]his case touches a sensitive and important area of human rights").
68 Skinner, 316 US at 541.
69 Id.
70 Id.
71 Id.
72 Skinner, 316 US at 541.
that the law at issue was particularly constructed to have a disproportionately negative impact on minority convicts.\textsuperscript{73} Therefore, the \textit{Skinner} Court appears to have accepted the proposition that sterilization laws are particularly dangerous because if inappropriately applied, they conceivably threaten the continued existence of a particular group.\textsuperscript{74} As a result, such laws should be strictly scrutinized.

2. Judges disagree as to whether the right to procreate survives incarceration.

While there is general agreement that procreation is a fundamental right, several courts have held that it is not a right that may be exercised in the prison setting.\textsuperscript{75} Although the plaintiff in \textit{Skinner} was allowed to preserve his ability to procreate,\textsuperscript{76} \textit{Skinner} did not determine whether prisoners have a right to engage in procreation while they are still in prison. Several lower courts have subsequently addressed this issue and their analyses have produced conflicting results.\textsuperscript{77}

In \textit{Goodwin v Turner},\textsuperscript{78} a prisoner brought suit challenging the Missouri Department of Corrections’ refusal to allow him to artificially inseminate his wife.\textsuperscript{79} In rejecting the prisoner’s request, the prison adopted a policy by which male prisoners would not be allowed to artificially inseminate their partners.\textsuperscript{80} The policy was based in part on the concern that, for the prison to accommodate artificial insemination, it “would either have to develop collection, handling, and storage procedures for semen or be opened up to private medical or technical persons to come in to collect the semen.”\textsuperscript{81} Prison officials opposed taking these meas-

\textsuperscript{73} See id at 537 (stating that the statute in question specifically excluded from its scope “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses”).

\textsuperscript{74} See id at 541 (stating that “[i]n evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear”).

\textsuperscript{75} See, for example, \textit{Percy v New Jersey Department of Corrections}, 651 A2d 1044, 1047 (NJ App 1995) (finding that, while inmates have the fundamental right to procreate, the state may prevent them from doing so due to valid penological concerns).

\textsuperscript{76} \textit{Skinner}, 316 US at 541.

\textsuperscript{77} Compare \textit{Goodwin v Turner}, 908 F2d 1395, 1400 (6th Cir 1990) (finding that a prison need not allow inmates to procreate), with \textit{Gerber}, 264 F3d at 890 (concluding that “the fundamental right to procreate survives incarceration”).

\textsuperscript{78} 908 F2d 1395 (8th Cir 1990).

\textsuperscript{79} Id at 1397–98.

\textsuperscript{80} See id at 1397 (quoting Bureau’s policy providing that “sound correctional policy dictates against allowing inmates to artificially inseminate another person”).

\textsuperscript{81} Id.
ures because they believed that allowing such activity inside the prison would either "require a significant drain on resources or create significant security risks."²

The prisoner challenging the Bureau's policy proposed a procedure that involved depositing semen into a clean container, which would then immediately be frozen by on-site medical personnel and transported to his wife for purposes of fertilization.³ The prisoner argued that he could not wait until his release date to inseminate his wife because, by that time, the risk of her having a child with a chromosomal abnormality would have increased.⁴ The prisoner agreed to pay all of the expenses associated with the procedure.⁵

The Goodwin court declined to decide whether the right to procreate survives incarceration.⁶ Despite recognizing procreation as a "fundamental right," the court upheld the policy of the Bureau of Prisons on the ground that allowing the plaintiff to artificially inseminate his wife would result in unequal treatment between male and female prisoners.⁷ The court noted that the Bureau's policies did not allow male inmates to artificially inseminate their partners without allowing female prisoners to be artificially inseminated as well.⁸ The court found that, while prisons can meet the procreative requirements of male inmates with relatively little difficulty, females require specialized services that prisons cannot provide.⁹ The court also found that the cost of providing these services to female inmates would unacceptably burden the Bureau's financial resources.¹⁰ In reaching this conclusion, the court neither addressed the fact that the

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² Goodwin, 908 F2d at 1397.
³ Id.
⁴ Id.
⁵ See id.
⁶ See Goodwin, 908 F2d at 1398 (stating that "we need not decide whether Goodwin's right to procreate by means of artificial insemination actually survives incarceration").
⁷ See id at 1399 (finding that the challenged regulation is "rationally related to the Bureau's interest of treating all inmates equally to the extent possible").
⁸ See id at 1400 (stating that "[w]e merely note that as a matter of the Bureau's established prison policy, and not as a matter of constitutional law, if male inmates are allowed to procreate, the Bureau will either be forced to accord some similar benefit on its female inmates or compromise its legitimate policy").
⁹ See id (noting that accommodation would "force the Bureau to grant its female inmates expanded medical services").
¹⁰ See Goodwin, 908 F2d at 1400 (stating that "[t]he significant expansion of medical services to the female population and the additional financial burden of added infant care would have a significant impact on the allocation of prison resources generally and would further undercut the Bureau's limited resources for necessary and important prison programs and security").
plaintiff in *Goodwin* offered to bear all the expenses himself\(^9\) nor ruled on the possibility that female inmates who wanted to procreate might legitimately be allowed to do the same. Instead, the Eighth Circuit confined its analysis to the Bureau’s policy and held that the Bureau had a legitimate penological interest in not allowing male prisoners to procreate.\(^9\)

In 2001 a three-judge panel of the Ninth Circuit found that incarceration does not extinguish the right for men to procreate (the “panel” decision).\(^9\) The plaintiff in *Gerber* was serving a life sentence in the California Department of Corrections (“CDC”).\(^9\) The plaintiff petitioned the CDC to allow him to artificially inseminate his wife.\(^9\) Like the prisoner in *Goodwin*, the *Gerber* plaintiff offered to pay all of the costs associated with the procedure.\(^9\) The CDC denied his request and the district court upheld the CDC’s decision.\(^9\) The appellate panel reversed the district court’s decision, finding that the district court had “erred by concluding that the right to procreate does not survive incarceration.”\(^9\)

The appellate panel began its analysis by noting that procreation is a fundamental right.\(^9\) The panel then found that states may address valid penological interests only by imposing restrictions on inmates that are less restrictive than a complete ban on procreation.\(^9\) While it may be appropriate for prisons to restrict actual physical contact between prisoners and members of external society, modern technology allows procreation to occur without such contact. The panel determined that allowing male

\(^9\) See id at 1397 (noting that “Goodwin did inform prison officials that he would bear all financial costs of the procedure”).

\(^9\) See id at 1400 (holding that “the Bureau's restriction on inmate procreation is reasonably related to furthering the legitimate penological interest of treating all inmates equally, to the extent possible”).

\(^9\) *Gerber v Hickman*, 264 F3d 882, 884 (9th Cir 2001) (concluding that “the right to procreate survives incarceration”), revd en banc, 291 F3d 617 (9th Cir 2002).

\(^9\) Id.

\(^9\) See id at 885.

\(^9\) See id.

\(^9\) *See Gerber v Hickman*, 103 F Supp 2d 1214, 1218 (E D Cal 2000) (holding that “[w]hatever right plaintiff has to artificial insemination, it does not survive incarceration”).

\(^9\) *Gerber*, 264 F3d at 892.

\(^9\) See id at 892 (stating that “[t]he Supreme Court has recognized a fundamental constitutional right to procreate on several occasions”).

\(^9\) See id at 890 (noting that although the “fundamental right to procreate survives incarceration,” the exercise of that right is “subject to restriction based on legitimate penological interests”).
prisoners to use alternative methods of procreation is reconcilable with valid penological concerns. \(^{101}\)

The panel rejected the CDC's argument that allowing male inmates to provide semen specimens would expose the prison to an unacceptable risk of liability—either by mishandling of the specimen, or because of suits brought by women who want to be artificially inseminated. \(^{102}\) The panel found this argument "reprehensible" because it suggested "that restricting protected fundamental constitutional rights is justified by fear of increasing a party's liability." \(^{103}\) The panel ultimately held that since the state had failed to make an adequate showing that allowing the prisoner to procreate would unreasonably interfere with legitimate penological interests, the prison could not deny him the right. \(^{104}\) This result was in accord with the panel's additional finding that the right for men to procreate survives incarceration. \(^{105}\)

The initial appellate decision in Gerber was overruled after an en banc rehearing by eleven judges from the Ninth Circuit (the "en banc" decision). \(^{106}\) The majority disagreed with the appellate panel's finding that procreation survives incarceration. \(^{107}\) In the majority's view, "[a] holding that the State of California must accommodate Gerber's request to artificially inseminate his wife as a matter of constitutional right would be a radical and unprecedented interpretation of the Constitution." \(^{108}\) The dissent, which consisted of five judges, responded to the majority's argument by stating that neither "prisons nor courts should deny a reasonable request for the exercise of a constitutional right simply because it is novel." \(^{109}\)

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\(^{101}\) See id at 892 (concluding that, "on the basis of the record before us, none of the rationales offered by the Warden falls within Turner's proscription—that the prison may only deny a constitutional right if the regulation is 'reasonably related to legitimate penological interests.'") quoting Turner, 482 US at 89.

\(^{102}\) See Gerber, 264 F3d at 891.

\(^{103}\) Id at 892.

\(^{104}\) Id (holding that the rationales offered by the Warden "fail under the first factor discussed in Turner: there is no 'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it").

\(^{105}\) See id at 890 (holding that "the fundamental right to procreate survives incarceration").

\(^{106}\) See Gerber, 291 F3d 617, 619 (9th Cir 2002) (affirming the decision of the district court).

\(^{107}\) See id at 622 (concluding that "the right to procreate is inconsistent with incarceration").

\(^{108}\) Id at 623.

\(^{109}\) Id at 628 (Tashima dissenting), quoting Goodwin, 908 F2d at 1407 (McMillian dissenting).
Goodwin and both the panel and en banc Gerber decisions can be seen as examples of how the judiciary's view of prisoner procreation has evolved in the sixty years since Skinner. Skinner considered whether the state may sterilize inmates, thus destroying their fundamental right to procreate. Goodwin and the two Gerber decisions address the extent to which a prison must accommodate a prisoner's desire to procreate. The Goodwin court suggested that the right to procreate may survive incarceration, but the court declined to decide the issue outright. Gerber's panel decision went further, finding that the right to procreate does survive incarceration, therefore suggesting that prisons must allow male inmates to procreate when they cannot show a valid penological interest for preventing such procreation. Although the panel decision in Gerber was reversed, the reversal was only achieved by a vote of six to five. This shows that in the minds of many appellate judges, the constitutional appropriateness of banning all inmate procreation is not a foregone conclusion.

D. Gender Distinctions under the Equal Protection Clause

In both Goodwin and Gerber, prison officials argued that allowing male prisoners to procreate was impossible because they would then be required to allow female prisoners to procreate as well. The Goodwin court declined to address whether the Constitution would prevent a prison from extending the right to procreate to male inmates without also extending the right to female inmates. Instead, the court based its decision on the fact that the Prison Bureau's self-imposed policy would have required such

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10 See Part I C 1.
11 See Goodwin, 908 F2d at 1396 (refusing to decide the issue of whether the right to procreate survives incarceration because, “even assuming Goodwin's right to procreate survives incarceration, the Bureau's restriction is reasonably related to its penological interest of treating all prisoners equally, to the extent possible”).
12 See Gerber, 264 F3d at 890 (concluding that “the fundamental right of procreation survives incarceration,” but that the exercise of that right is “subject to restriction based on legitimate penological interests”).
13 See Goodwin, 908 F2d at 1400 (addressing the Bureau's policy statement, noting that were the Bureau were forced to allow male prisoners to procreate, it would “have to confer a corresponding benefit on its female prisoners”). See also Gerber, 264 F3d at 891 (describing the Warden's claim that “permitting a prisoner to provide a semen sample would create an unacceptable risk of liability for the prison ... [because of] ... suits by women inmates seeking to be artificially inseminated”).
14 See Goodwin, 908 F2d at 1400 (stating that “[w]e do not hold that if the Bureau allows Goodwin to procreate, then it must as a matter of constitutional law allow its female inmates to procreate”).
a result. The court thus left open the question of whether allowing male and female inmates to procreate in prison may be appropriate under certain conditions. Similarly, Gerber's panel decision avoided the prison's argument that the state would unacceptably infringe on the equal protection rights of female prisoners if it allowed male inmates to procreate. Instead, the court simply noted that the question of female procreation was not before it. The Supreme Court's gender discrimination case law, however, suggests that a prison system that allows male inmates to procreate must also allow its female inmates to do the same, unless it can show that it has an "exceedingly persuasive" reason for not doing so.

Supreme Court decisions concerning gender equality have made clear that in order for a classification based on gender to be constitutionally valid, it must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The Court has also noted that sex classifications "are inherently suspect and must therefore be subjected to close judicial scrutiny." The exact standard that courts should apply in gender discrimination cases was clarified in J.E.B. v Alabama, where the Court held that "gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny."

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115 See id (noting that "as a matter of the Bureau's established prison policy, and not as a matter of constitutional law, if male inmates are allowed to procreate, the Bureau will either be forced to accord some similar benefit on its female inmates or compromise its legitimate policy").

116 See Gerber, 264 F3d at 891 (noting that "[t]he Warden's equal protection argument assumes matters not before the court").

117 See id (stating that "[w]omen cannot avail themselves of the opportunity Gerber narrowly seeks... [t]herefore, the policy of treating inmates 'equally to the extent possible' is not implicated").

118 See United States v Virginia, 518 US 515, 531 (1996) (stating that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action").


120 Frontiero v Richardson, 411 US 677, 682 (1973) (finding unconstitutional a statute providing that spouses of female members of uniformed services qualify as dependents only if they are in fact dependent for over one-half of their support, whereas spouses of male members automatically qualify).

121 511 US 127 (1994).

The most recent Supreme Court case to employ the “exceedingly persuasive justification” standard is *United States v Virginia.* In *Virginia*, after a female student who wished to gain admission to the Virginia Military Institute ("VMI"), an all-male, publicly-funded university, filed a complaint, the United States brought an Equal Protection suit against the Commonwealth of Virginia and VMI. In an attempt to appease females who wished to attend VMI, Virginia established the Virginia Women’s Institute for Leadership ("VWIL"), an all-female undergraduate college that shared VMI’s mission of producing “citizen soldiers.” The *Virginia* Court however, did not find VWIL to be a constitutionally valid substitute for VMI because, in the Court’s view, Virginia had failed to prove that VWIL was VMI’s equal. In addition, Virginia was unable to show an “exceedingly persuasive justification” for excluding all women from the citizen-soldier training afforded by VMI.” The Court’s holding in *Virginia* reveals that gender classifications will not pass constitutional muster unless the state can show an “exceedingly persuasive justification” for implementing the classification. While the exact strictness of this standard is unclear, the Court did state that “[t]he burden of justification is demanding and it rests entirely on the State.” Additionally, it is not enough for the state to merely claim that its gender distinctions are made in furtherance of some legitimate state interest. The state must prove that its policies achieve their intended goal. While the state’s interests do have some merit, they must give way to the Constitution’s greater interest in ensuring equality between the sexes. Thus, such regulations can stand only if they are based on an “exceedingly persuasive” justification.

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124 Id at 520, 523.
125 Id at 526.
126 See id at 551 (stating that “[i]n myriad respects other than military training, VWIL does not qualify as VMI’s equal”).
127 *Virginia*, 518 US at 534.
128 Id at 533.
129 See *Frontiero*, 411 US at 689 (stating that “[i]n order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members than it is, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement”).
130 See id at 690 (stating that while “efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency’”), quoting *Stanley v Illinois*, 405 US 645, 656 (1972).
II. INMATE PROCREATION IS A CONSTITUTIONAL RIGHT THAT MAY PRACTICALLY BE EFFECTUATED

Prison officials frequently make two arguments for why prisoners should be denied the right to procreate. These are (1) allowing prisoners to procreate impermissibly compromises the valid penological interests of maintaining prison safety and conserving prison resources;¹³¹ and (2) even if inmate procreation could be performed without violating penological interests, the law does not require prison officials to allow procreation in the prison setting.¹³² Each of these arguments is addressed in sections A and B below. Section C demonstrates why states are constitutionally required to allow female as well as male inmates to enjoy their procreative right.

A. Procreation While Incarcerated Will Not Unreasonably Strain Prison Security Measures or Financial Concerns.

1. Security may be maintained even when outside medical personnel are required to enter a prison.

In the past, prison officials could validly claim that allowing prisoners to procreate would have posed serious prison safety concerns. Prior to the development of artificial insemination and egg harvesting technologies, allowing a prisoner to procreate would have required leaving an outsider alone with the inmate. Obviously, such a situation is potentially dangerous. Consequently, courts widely recognize that prisoners do not have a right to engage in certain activities, such as conjugal visitation, that would necessarily leave them unsupervised.¹³³ Modern technology now makes it possible for male inmates to procreate without coming into physical contact with another person, however, and female inmates would require only minimal contact. It therefore seems increasingly inappropriate for prison officials to argue that safety concerns prohibit any sort of prisoner procreation from taking place.

¹³¹ See, for example, Goodwin, 908 F2d at 1397 (stating the prison’s argument that allowing inmate procreation “would either require a significant drain on resources or create significant security risks”).
¹³² See, for example, Gerber, 264 F3d at 885 (stating the prison’s argument that “the right to procreate does not survive incarceration”).
¹³³ See, for example, Hernandez v Coughlin, 18 F3d 133, 137 (2d Cir 1994) (finding that “even though the right to marriage is constitutionally protected for inmates, the right to marital privacy and conjugal visits while incarcerated is not”).
Male inmate procreation may be effectuated through artificial insemination, "one of the oldest methods of assisted reproduction." This process requires only a clean container and a means by which to speedily ship semen (which may need to be medically frozen) out of the prison. As far as females are concerned, procreation without actual physical contact with another person may be achieved through a method called egg harvesting or surrogate motherhood. In this process, medical personnel collect the inmate's eggs, fertilize them in vitro and then implant them into the womb of a surrogate mother. As one scholar has found, "[s]urrogacy is becoming quite common." Furthermore, another scholar has found that this method might be suitable in the prison setting because it "creates negligible administrative inconvenience."

An obvious security concern raised by both of these procedures is that they will likely require outside medical personnel to enter the prison. While it seems reasonable for prison officials to desire to keep as few people from entering and leaving the prison as possible, courts have routinely held that prisons must admit outside personnel when the Constitution so requires. For example, in the recent case of Jones'El v Berge, mentally ill inmates in a supermaximum security prison sought a preliminary injunction, claiming that the conditions of their confinement violated the Eighth Amendment. Finding that the plaintiffs had sufficiently pled facts that could lead to success on a claim of cruel and unusual punishment under the Eighth Amendment, the
court granted the preliminary injunction. Specifically, the court ordered the warden of the prison to allow independent medical personnel onto the premises in order to evaluate the mental health of certain groups of inmates.

In *Jones v Wittenberg*, another case brought by inmates, the court found that the conditions of incarceration in an Ohio prison were inappropriate under the Eighth Amendment. In order to remedy this situation, the court required that the prison allow inmates to undergo dental examinations and treatment. Obviously, this order could not be carried out unless prisoners were permitted to personally meet with outside personnel, a potentially hazardous requirement. Nonetheless, both *Jones* and *Jones'El* show that courts have required prisons to allow these activities in order to meet the medical needs of their prisoners.

Prison officials also argue that prisoner procreation creates an impermissible security risk by providing the inmates with objects that they could use to harm or harass other incarcerated individuals. This argument ignores the fact that in many cases prisoners are already allowed to possess, or be in the vicinity of, instruments that could possibly be used in an improper fashion. For example, the requirement in *Jones* that prisoners be allowed to undergo dental examinations necessarily also meant that the prisoners be allowed near dental implements, several of which might easily be used as weapons. Additionally, the court in *Jones* required the prison to furnish inmates with toothbrushes and shaving gear, which are also capable of being used improperly.

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141 See id at 1120–21 (stating that “plaintiffs have more than a negligible chance of success in demonstrating that the conditions at Supermax are sufficiently serious”).

142 See id at 1126 (stating that “defendants are directed to arrange for mental health professionals not employed by the Department of Corrections to perform evaluations immediately”).


144 See *Jones v Wittenberg*, 323 F Supp 93, 99 (N D Ohio 1971) (stating that “if the constitutional provision against cruel and unusual punishment has any meaning, the evidence in this case shows that it has been violated”).

145 See *Jones*, 330 F Supp at 718 (requiring, among other things, that defendants provide “[a]dequate facilities for dental examinations and treatment, both curative and preventative”).

146 See, for example, *Gerber*, 264 F3d at 891 (detailing Warden’s concern that “the procedure for collecting semen would create an unacceptable risk that prisoners would misuse their semen”).

147 See *Jones*, 330 F Supp at 718 (mandating that “[e]ach prisoner who does not bring such items with him when he enters the jail shall be furnished with soap, toothbrush, toothpaste, and shaving gear so as to be able to maintain good personal hygiene”).
Therefore, courts recognize that certain prisoners may be trusted to use specific items in the proper manner.

2. Courts will impose financial burdens on prisons in order to preserve constitutional rights.

In addition to security concerns, prison officials are extremely worried about straining their financial resources. For example, in cases in which male inmates have tried to assert their right to procreate in prison, prison officials have argued that courts should not grant the right because prisons do not have the financial ability to accommodate the same right in females. Courts have employed two approaches regarding this issue: they have either agreed with prison officials," or they have left the issue open for resolution in a subsequent case. In cases concerning other fundamental rights in prison, however, courts have held that, despite financial concerns, prisons must provide inmates with certain services and facilities.

First, courts have ruled that, where a constitutional right is concerned, economic factors cannot justify its total denial. Thus, courts have not allowed prisons to claim that it is not economically feasible for them to provide prisoners with access to legal materials, or in the case of female inmates, access to abortion facilities. Despite the fact that economic factors can become central to affirmative remedies for constitutional inadequacies, "such

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148 Gerber, 264 F3d at 891 (noting Warden's argument that granting women the opportunity to be artificially inseminated would lead to "obvious' and 'prohibitive' burdens"); Goodwin, 908 F2d at 1397 (quoting prison policy stating that allowing prisoners to artificially inseminate their spouses "would require a significant drain on prison resources"); Percy v New Jersey Department of Corrections, 651 A2d 1044, 1046 (NJ App 1995) (noting that "[i]f female prisoners had the right to artificial insemination, the financial burdens and security concerns would be quite significant inside the prison").

149 See, for example, Goodwin, 908 F2d at 1400 (holding that the challenged regulation is rationally related to the legitimate penological interest of treating all inmates equally).

150 See, for example, Gerber, 264 F3d at 891 (stating that the equal protection argument assumes matters not before the court).

151 See Monmouth County Correctional Institutional Inmates v Lanzaro, 834 F2d 326, 337 (3d Cir 1987) (stating that "where conditions within a prison facility are challenged as constitutionally inadequate, courts have been reluctant to consider costs to the institution a major factor in determining whether a constitutional violation exists").

152 See, for example, Myers v Hundley, 101 F3d 542, 544 (8th Cir 1996) (stating that "prisons must provide inmates with some access to legal materials or to legal assistance").

153 Lanzaro, 834 F2d at 336-37 (finding that county's policy of denying access to, and funding for, elective abortions cannot be justified by its asserted administrative and economic considerations).
considerations ordinarily cannot justify imposition of a restrictive regulation that infringes on a constitutional right."154

Second, courts have been willing to impose extreme financial burdens on prisons when they have determined that prisoners are being denied their constitutional rights.155 In *Tillery v Owens*,156 plaintiffs brought an action under 42 USC § 1983 alleging that the conditions of confinement at the State Correctional Institution at Pittsburgh ("SCIP") were unconstitutional.157 Agreeing with the plaintiff, the court ordered a litany of costly changes to occur. Among others, these measures included temporarily reducing the number of inmates housed at SCIP,158 hiring additional corrections officers,159 installing fire safety measures,160 hiring consultants to advise the prison on making necessary changes to the medical facilities,161 establishing a separate housing unit (which included a full-time psychiatrist) for mentally ill inmates,162 hiring a cardiologist to periodically examine inmates with cardiovascular disease,163 and finally, hiring a prison monitor to ensure that all of these changes actually took place.164 Even though the implementation of these changes would be costly, the court ruled that they were necessary because SCIP fell below constitutional standards.165

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154 Id.
155 See, for example, *Jones*, 330 F Supp at 713 (suggesting that it might be appropriate for the sheriff to "reduce his expenditures for police activities to whatever extent might be necessary to provide for the proper operation of the County Jail").
156 719 F Supp 1256 (W D Pa 1989).
157 See id at 1259 (stating that "[t]his Section 1983 class action challenges the constitutionality of the conditions of confinement at [SCIP]").
158 See id at 1274 (stating that where there are constitutionally inadequate cells that must be replaced, "[t]his will undoubtedly mean a reduction in the SCIP inmates at least during the renovation").
159 See id (requiring defendants to "take immediate steps to eliminate double-celling . . . by hiring sufficient additional corrections officers").
160 See *Tillery*, 719 F Supp at 1280 (requiring defendants to "provide the Court with a plan to ensure that inmates . . . are reasonably safe from the dangers of fire").
161 See id at 1303 (requiring Commonwealth to pay reasonable costs of consultants to review draft plans).
162 See id (noting that 70 percent of the states have special needs units, and stating that "[t]o meet constitutional requirements, SCIP, as the regional center for receiving, identifying and housing severely mentally ill inmates, should establish such a unit").
163 See id at 1307 (noting that "in contrast to basic medical care standards, no cardiologist regularly visits the institution" and stating that "[a] cardiologist should be retained to examine periodically those inmates identified as having cardiovascular disease").
164 See *Tillery*, 719 F Supp at 1309 (noting that "[t]he task of maintaining liaison with counsel, the various parties and the staff of the institution will be too great for the court by itself," and thus appointing "an individual to serve as prison monitor in this case, that person to be paid by defendants").
165 See id at 1259.
Similarly, the Jones court ordered several costly measures. These included reducing the inmate population, ordering the jail lighting system, ordering the sheriff to train additional prison personnel, allowing dental examinations, and ordering that all incoming inmates undergo medical examinations. Tillery and Jones therefore show that prison officials are not permitted to deny prisoners' enjoyment of their constitutional rights on the ground that implementing those rights is beyond the prison's financial means.

Finally, it is important to note that, despite their assertions to the contrary, prisons need not necessarily be responsible for financing the prisoner's costs related to procreation. Significantly, male inmates have brought several cases in an attempt to secure their right to procreate in prison and in several of these cases the inmates were willing to finance the cost of the procedure out of their own pocket. While one might argue that requiring inmates to pay for the costs of their medical procedures out of pocket will have a disproportionate impact on female inmates, this is not necessarily the case. It is true that the artificial insemination procedure may be less costly for men than the harvesting procedure is for women. Nonetheless, it is still appropriate for prisons to require women to pay for the procedures they require. This is because viewing procreation as an act that occurs between two members of the opposite sex, the cost of the procedure borne equally by both men and women, regardless of which partner is imprisoned.

In cases where inmates are not willing to finance the procedures associated with procreation, prisons still may not be obligated to pay. The Supreme Court's decision in Rust v Sullivan suggests that, while the state may not impermissibly curtail a fundamental right, it has no obligation to finance an inmate's

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166 Jones, 330 F Supp at 714 (stating that "[the] first change which must be made is a reduction of inmate population").
167 See id at 715.
168 See id (noting that "[c]ontrol of many of the problems in the jail is dependent upon having an adequate number of properly trained guards on duty in the jail at all times").
169 See id at 718.
170 See Jones, 330 F Supp at 718 (requiring that "[e]very entering prisoner must receive a medical examination before being assigned to a regular cell").
171 See, for example, Gerber, 264 F3d at 885; Goodwin, 908 F2d at 1397; Percy v New Jersey Department of Corrections, 651 A2d 1044, 1045 (NJ App 1995).
enjoyment of that right.\textsuperscript{173} Thus the argument that prisons cannot afford to finance inmate procreation fails because case law suggests that prisons may legitimately require inmates to pay the full cost of the procedure.\textsuperscript{174}

B. The Constitution Requires That the Right to Procreate Be Extended to Male and Female Inmates

The state has a legitimate interest in limiting the right of inmates to procreate. However, an absolute ban on prisoner procreation is a broader restriction than is necessary to satisfy those interests. This is true even after Turner, which found that a prison regulation that impinges on a prisoner's constitutional rights will be upheld as long as it is "reasonably related to legitimate penological interests."\textsuperscript{175} The fact that an absolute ban on prisoner procreation is unconstitutional becomes evident once the burden of accommodating artificial insemination and egg harvesting in the prison setting is measured against the factors that the Turner Court suggested lower courts apply when determining the reasonableness of a challenged prison regulation.\textsuperscript{176}

First, under Turner, the prison must show a rational connection between the regulation and the government interest put forth to justify it.\textsuperscript{177} In Gerber, the prison officials opposed allowing procreation on the grounds that to do so would compromise prison security and would stress the prison’s financial resources.\textsuperscript{178} These concerns are questionable given the reality of the requirements of artificial insemination and egg-harvesting procedures.

\textsuperscript{173} See id at 201 (stating that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected").

\textsuperscript{174} This is not to say that inmates could be made to pay costs contingent to the procedure, such as additional security measures or the addition of new facilities. These additional costs are not specific to any individual inmate, but rather are an inevitable consequence of allowing inmates to enjoy their right to procreate. An inmate should therefore not be expected to shoulder these financial burdens any more than inmates are expected to bear the additional costs associated with the enjoyment of other fundamental rights, such as the security costs connected with allowing inmates to enjoy their right to counsel.

\textsuperscript{175} Turner, 482 US at 89.

\textsuperscript{176} See id at 89–90 (listing "several factors [that] are relevant in determining the reasonableness of the regulation at issue"). See also text accompanying notes 48–53.

\textsuperscript{177} See id (stating that "[f]irst, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it").

\textsuperscript{178} See Gerber, 264 F3d at 885, (stating that the Warden moved to dismiss on the basis that "the restriction on artificial insemination is reasonably related to the legitimate penological goals of . . . conserving prison resources, [and] maintaining institutional security interests").
Allowing a male inmate to artificially inseminate his partner requires him to do little more than ejaculate into a clean container.\(^{179}\) While it is possible that an inmate might behave improperly while performing this function, there is no reason to believe that an inmate who has a legitimate interest in procreating would do so. Indeed, the panel decision in *Gerber* dismissed the prison's unsupported assertion that a male inmate might misuse his semen while performing this procedure as "argumentative.\(^{180}\)

As for female inmates, harvesting would require the inmate to be around medical personnel, but it is difficult to see how prisons may reasonably consider this to be a security concern if the procedure were limited, for example, only to inmates that have been convicted of non-violent crimes, or who have not displayed any violent behavior during their incarceration. Obviously, a prison should not be obligated to extend the right of procreation to inmates that it reasonably believes will abuse the right. Thus, given the fact that a prison need only extend to right of procreation to inmates that have a legitimate interest in exercising it, a prison's ability to successfully argue that it meets the first of the *Turner* factors seems dubious.

The second factor proposed by the *Turner* Court was whether there is an alternative means for the inmate to exercise his right.\(^{181}\) By definition, a prison's absolute ban on prisoner procreation has the practical effect of absolutely preventing a prisoner from reproducing while they are incarcerated. When such a ban is in place the prisoner's only possible option is to wait until he or she is released from prison in order to exercise his or her procreative right. Obviously, this is not a meaningful opportunity for prisoners serving life sentences. Often, it is also an inadequate remedy for those who have to spend even a shorter period of time in prison. A female inmate who has been sentenced to prison for twenty years, for example, could easily be released after it is possible for her to safely bear children. Male inmates also potentially have this problem, for, as was the case in *Goodwin*, the inmate may not be scheduled for release until such a time when it is no

\(^{179}\) See id (stating Gerber's assertion that once a medical facility mailed him a suitable container, all that is required is to "ejaculate into the receptacle, place it into the return mailer, and send it by overnight mail back to the laboratory").

\(^{180}\) Id at 891.

\(^{181}\) See *Turner*, 482 US at 90 (stating that a second factor "is whether there are alternative means of exercising the right that remain open to prison inmates").
longer advisable for his partner to have a child. Therefore, an absolute ban on prisoner procreation leaves some prisoners with no alternative means to exercise their right. Thus, such regulations fail under the second factor in *Turner*.

Third, before allowing a right to be enjoyed in prison, courts should consider the impact that accommodating the right will have on the general prison environment. Undoubtedly, allowing prisoner procreation could have a negative impact on the prison generally. Prisoners could potentially try to take advantage of the right in order to effectuate escape or even possibly to harm other prisoners or prison personnel. Given these possibilities, prisons should only be required to allow prisoner procreation through minimally intrusive methods, such as artificial insemination and egg harvesting. Prisons should also be allowed to enforce certain restrictions on the right, such as only extending it to well-behaved inmates. In short, if given sufficient latitude, prison officials should be able to devise a system by which inmates can enjoy their fundamental right to procreate with minimal impact on the overall prison setting.

It is also worth noting that allowing inmate procreation may actually decrease safety risks within the prison. This is because the overall behavior of inmates may improve once they learn that only well-behaved inmates will be permitted to exercise their right. Furthermore, the general goal of preventing crime may be furthered by allowing inmates to procreate, as some evidence suggests that recidivism occurs less frequently among inmates who have families in the outside world than it does among inmates with no such family obligations.

Finally, a prison regulation may be considered reasonable where there are no ready alternatives to the procedure adopted.

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182 See, for example, *Goodwin*, 908 F2d at 1396 (stating that Goodwin and his wife "do not want to delay conception until his release because of their concern about the increased risk of birth defects as a result of increasing maternal age").

183 See *Turner*, 482 US at 90 (stating that “[a] third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”).

184 See Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 NYU L Rev 275, 294 (1985) (citing study showing that “marriage and other close family ties during imprisonment can reduce recidivism”); See also Jacqueline B. DeOliveira, *Comment*, 5 Touro L Rev at 207 (cited in note 136) (hypothesizing that “[t]he chance to have children and the hope that one day the prisoner will be able to share more fully in the experience of parenthood could serve as a strong impetus to rehabilitation and a desire to reject criminal behavior as a way of life”).
by prison administrators. On the other hand, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." Artificial insemination and egg harvesting represent such alternatives because they allow inmates to engage in the activities necessary for procreation without leaving the inmates alone with outside individuals, thereby avoiding the risks associated with the traditional manner of procreating. Applying the potential dangers of prisoner procreation to the factors in Turner therefore suggests that in some form, prisoner procreation can be accommodated in the prison setting.

In Gerber's en banc decision, the majority attempted to sidestep Turner by removing the technology issue from the debate over prisoner procreation altogether. According to the majority, their conclusion that procreation does not survive incarceration did not stem from scientific considerations. Instead, the court's decision was made in "consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation." This analysis seems to disregard the spirit of Turner, however. The Turner Court required prisons to allow inmates the right to marry, noting that many attributes of marriage are "unaffected by the fact of confinement or the pursuit of legitimate corrections goals." This seems to suggest that, to the extent that they do not interfere with legitimate prison concerns, fundamental rights in addition to marriage should be permitted to exist in prison. As the dissent in Gerber's en banc decision stated "because of the technology of artificial insemination ... procreation can be achieved without compromising security." As a result, under Turner, inmate procreation by means of artificial insemination and egg harvesting should be allowed.

In addition to Turner, other case law provides support for the conclusion that regulations prohibiting all procreation by inmates

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185 See Turner, 482 US at 90 (stating that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation").
186 Id.
187 See Gerber, 291 F3d 617, 622 (9th Cir 2002) (stating that "[o]ur conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on easy or how difficult it is to accomplish").
188 Id (stating that the court's analysis would not change even if "science progressed to the point where Gerber could artificially inseminate his wife as easily as write her a letter").
189 Id.
190 Turner, 482 US at 96.
191 Gerber, 291 F3d at 625 (Tashima dissenting).
are unreasonable and inappropriate. One such case is *Skinner*, which held unconstitutional an Oklahoma statute providing for the sterilization of certain criminals. While the Court overturned the statute on equal protection grounds, the Court was obviously troubled by the fact that application of the statute resulted in sterilization. Although the Court's opinion does not state it explicitly, there is language in *Skinner* indicating that the Constitution does not permit states to sterilize inmates outright. Denying prisoners the right to procreate often has the practical effect of sterilizing inmates, particularly those who are serving long sentences. This concern is especially pertinent to female prisoners, since females normally lose their ability to reproduce at an earlier age than males do. Consequently, the policy of preventing inmates from procreating appears to be in conflict with the Supreme Court's ruling.

It is true that the constitutionality of sterilization regimes generally was not ultimately decided in *Skinner*. Nonetheless, cases subsequent to *Skinner* have established that the state may not sterilize its citizens without first providing adequate procedural protections. Even in the Supreme Court's famous ruling in *Buck v Bell*, in which the Court upheld a Virginia involuntary sterilization statute, the Court recognized that the statute at issue had several procedural safeguards in place.

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192 See *Skinner*, 316 US at 541 (finding unconstitutional an Oklahoma statute allowing the sterilization of certain criminals).

193 See id at 541 (stating that procreation is "fundamental to the very existence and survival of the [human] race").

194 See, for example, id (stating that "[t]he power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to whither and disappear. There is no redemption for the individual touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.").


196 See *Skinner*, 316 US at 543 (leaving it to the Oklahoma Supreme Court to decide in the first instance whether the sterilization regime would be constitutional if altered so as to remove the Equal Protection objection).

197 See, for example, *Vaughn v Ruoff*, 253 F3d 1124, 1129 (8th Cir 2001) (stating that "[s]terilization results in the irreversible loss of one of a person's most fundamental rights, a loss that must be preceded by procedural protections").


199 See id at 296 (noting that the statute at issue had procedures in place to "protect[] the patients from possible abuse").
Currently there are no procedural safeguards in place to determine if incarcerating a certain individual will lead to "constructive sterilization," for example. Prisons do not determine if females will be released past an age where they will physically be able to conceive children. To allow this deprivation to occur without procedural safeguards seems to be at odds with the constitutional mandate that individuals be allowed to enjoy "their Due Process Clause right to be free from coerced sterilization without appropriate procedures."

*Turner, Skinner* and their progeny provide a compelling argument that the right to procreate survives incarceration. As was stated in *Gerber's* panel decision, "[t]aken together, *Turner* and *Skinner* suggest that the fundamental right of procreation may exist in some form while a prisoner is incarcerated."

In addition, the Supreme Court has held that marriage and procreation are rights of equal importance. The Court has also held that prisons may not deny inmates the right to marry. Central to the decision in *Turner* was the Court's finding that prisons could accommodate the right to marry without overburdening penological concerns, such as prison safety. The logical conclusion of these holdings is that where prisoner procreation does not overburden penological concerns, prisons must also accommodate a prisoner's right to procreate.

Of course, rights are "subject to substantial restrictions as a result of incarceration." For example, the *Turner* Court made a point of noting that its decision did not hold that married inmates are entitled to all of the benefits of marriage. The Court did note, however, that those housed in prisons can enjoy many of the intangible benefits of marriage, such as the spiritual significance

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200 *Vaughn*, 253 F3d at 1129.
201 *Gerber*, 264 F3d at 889.
202 See *Zablocki v Redhail*, 434 US 374, 386 (1978) (stating that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, child birth, child rearing, and family relationships").
203 See *Turner*, 482 US at 99–100 (holding unconstitutional a Missouri statute permitting an inmate to marry only with the permission of the prison superintendent, and providing that such approval should only be given "when there are compelling reasons to do so").
204 See id at 98 (stating that "[t]here are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a de minimis burden on the pursuit of security objectives").
205 *Turner*, 482 US at 95.
206 See id (stating that "the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration").
of the act. The same can be said of the right to procreate. While valid restrictions may prevent the prisoner from fully enjoying the experience of traditional parenting, there are many intangible benefits that a prisoner can experience, such as the satisfaction of watching her child mature into adulthood. Incarceration need not significantly diminish the satisfaction an individual can derive from being a parent.

Since technological and medical advances mean that prisoners of both sexes may now procreate without coming into physical contact with another person, the argument that allowing prisoner procreation poses undue safety risks (especially for minimum security and/or non-violent prisoners) seems suspect. Furthermore, the argument that prisons cannot afford to allow prisoner procreation seems tenuous given the fact that courts insist that prisons provide inmates with constitutional rights even where doing so is costly.

C. The Equal Protection Clause Requires That Female Prisoners Be Allowed to Enjoy the Right to Procreate

Prison officials should not be allowed to deny the right of procreation to either male or female prisoners. This is because egg harvesting and sperm donation are roughly equivalent procedures, both of which are becoming more and more commonplace. As such, for a prison to argue that it cannot allow male procreation because female procreation would also be required is inappropriate.

Under the current law, such an argument should fail for three reasons. First, given the fact that both sperm and egg donation are minimally intrusive procedures, a prison will have a difficult time arguing that the distinction between them is not solely gender-based, but rather is supported by an exceedingly persuas-

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207 See id (stating that "[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life").
208 See Part II A 1.
209 See Part II A 2.
211 See Christine A. Djalleta, Comment, A Twinkle In a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology, 67 Temple L Rev 335, 359 (1994) (stating that "[s]perm is routinely donated and egg donation is becoming increasingly more common").
sive justification. The distinction would therefore be inappropriate under Virginia.\textsuperscript{112} Undeniably, egg harvesting is more difficult to effectuate than sperm donation, but the fact that women have different requirements when it comes to procreation is not something that can or should be avoided. It is understood that “women may need treatment different than that accorded to men in order to effectuate their membership in important spheres of social life.”\textsuperscript{113} Prisons must accept the procreative differences that exist between men and women and accommodate them because “in a society constitutionally committed to equality, the reality of biological difference . . . should not be permitted to justify state action exaggerating the consequences of those differences.”\textsuperscript{114}

The second reason that the Equal Protection arguments put forth by prison officials in both Gerber and Goodwin come into conflict with constitutional law is that they sound precisely like the kind of post hoc justification that the Virginia court explicitly rejected.\textsuperscript{115} In neither Goodwin nor Gerber was there any indication that the prison officials had ever considered allowing male or female prisoners to procreate. For the prison officials to argue that they derived their policy of preventing male inmates from procreating from their inability to reasonably accommodate female procreation seems disingenuous. As the Virginia Court found, the state may not justify differentiating between men and women by making an argument that it developed in response to litigation.\textsuperscript{116} The Equal Protection arguments put forth by the prison officials in Goodwin and Gerber, seem to have been developed for precisely the purpose of opposing the litigation and should therefore be rejected under Virginia.

Finally, a prison policy that only extends the right of procreation to its male inmates would have to overcome a strong pre-

\textsuperscript{112} See Virginia, 518 US at 531 (stating that “parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action”).


\textsuperscript{115} See Virginia, 518 US at 533 (stating that “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”).

\textsuperscript{116} Id.
A prison should not be able to overcome this burden because allowing both male and female inmate procreation does not place an onerous burden on a prison. Thus, a prison may not continue to prevent its inmates from enjoying this fundamental right.

CONCLUSION

This Comment has made three arguments. First, allowing prisoner procreation would not impermissibly impose on a prison’s ability to administer itself. The argument to the contrary is at odds with court decisions that routinely require prisons to go to great lengths in order to adequately meet constitutional requirements. Second, the right to procreate survives incarceration. Male and female inmates must therefore be allowed to procreate. Third, despite their physical differences, both male and female inmates must be permitted to enjoy this right. Allowing only one sex to enjoy the right of procreation would constitute gender discrimination. Such discrimination may only be upheld upon a showing of an “exceedingly persuasive justification” for the distinction. There seems to be no such justification here.

Prison officials will face numerous problems when they are required to allow inmate procreation. Indeed, the challenges facing a prison administrator who must allow prison procreation are so formidable that one can hardly blame prison officials from balking at the idea of accommodating even the relatively simple task of male procreation. The law, however, does not exist for the purpose of making one group of people comfortable, nor does the Constitution protect only those rights that are easily obtained. The actual implementation of the requested change may be burdensome and costly, but once it is determined that the change may reasonably be effectuated, cost and burden should no longer dictate the availability of the privilege. Applying a less demanding standard is not appropriate when it comes to ensuring that all citizens enjoy their fundamental rights.

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217 See id at 532 (noting that the Supreme Court has “carefully inspected official action that closes a door or denies opportunity to women”).
218 See Part II A 1.