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Marriage, Procreation, and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?

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MARRIAGE, PROCREATION AND THE PRISONER: SHOULD REPRODUCTIVE ALTERNATIVES SURVIVE DURING INCARCERATION?

Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.¹

INTRODUCTION

As a result of lawful incarceration, many rights and privileges which are afforded other citizens under the Constitution are necessarily curtailed or withheld from prison inmates.² Generally, federal and state prison administrators promulgate the regulations which govern the extent of prisoners' rights. In the past, these officials have exercised almost unfettered discretion in this area of prison administration.³

However, the Supreme Court has frequently and emphatically asserted that prisoners do not lose all constitutional protections during confinement.⁴ Those rights and privileges which are not inconsistent with legitimate penological objectives must be preserved, subject to reasonable restriction.⁵ Prison administrators and the courts have struggled with the notions of marital and procreative rights as they relate to prisoners, with the result that certain jurisdictions have at-

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

2. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)); see *infra* note 55 and accompanying text.

3. See 18 U.S.C. § 4042 (1982); see also 17 Op. Att'y Gen. 565 (1983) (prisoners confined in state prisons under federal or state sentences are subject to rules and regulations promulgated by the several states); see generally Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275 (1985).

4. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); accord, *Turner v. Safley*, 482 U.S. at 84; *O'Lone v. Estate of Shabazz*, 107 S. Ct. 2400, 2404 (1987) (5-4 decision); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978).

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

tempted to severely curtail these rights,⁶ while others have allowed them to remain virtually intact throughout incarceration.⁷

Recently, Steven Goodwin, a prison inmate, brought suit against the federal government because he had been refused permission to artificially inseminate his wife.⁸ The prisoner is currently serving a fourteen year sentence for a drug conviction. He views artificial insemination as his only chance to have children with his wife, since he has been denied the opportunity to engage in conjugal visitation and

6. *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983) (upholding authority of Florida Department of Corrections to promulgate regulations restricting marriages of inmates); *Holden v. Florida Dep't of Corrections*, 400 So. 2d 142 (Fla. Dist. Ct. App. 1981) (evidence supported finding that proposed marriage would adversely affect prison security and inmate's rehabilitation interests; however, applicable statutory section did not automatically suspend the right of convicted felons to marry); *Department of Corrections v. Roseman*, 390 So. 2d 394 (Fla. Dist. Ct. App. 1980) (Department of Corrections has statutory authority to promulgate rules on subject of marriage by prison inmates, and proposed rule prohibiting marriage of prison inmates who are sentenced to death, inmates under life sentences who must serve at least 25 years before parole, and inmates who wish to marry other inmates, has a rational basis in that it serves a legitimate state interest and is not constitutionally invalid); *Koerner v. New Jersey Dep't of Correction*, 183 N.J. Super. 433, 394 A.2d 1282 (1978) (prisoner's constitutional rights were not violated by Department of Corrections' regulation prohibiting the use of prison facilities for marriage ceremony for security reasons); see also *Paulley v. Wilson*, 822 F.2d 59 (6th Cir. 1987) (reversing district court's dismissal as frivolous a suit alleging Kentucky policy which denied prisoner right to marry another prisoner was unconstitutional, in light of *Turner*); *Ferrin v. New York State Dep't of Correctional Servs.*, 71 N.Y.2d 42, 517 N.E.2d 1370, 523 N.Y.S.2d 485 (1987) (declaring marriage of prisoner serving life sentence void ab initio); N.Y. CIV. RTS. LAW § 79-a (McKinney 1976) (persons sentenced to imprisonment for life are thereafter deemed civilly dead and are therefore incapable of contracting to marry); R.I. GEN. LAWS § 15-5-1 (1956) (decreeing divorce in cases where either party is deemed to be civilly dead as a result of a criminal act).

7. See, e.g., *Salisbury v. List*, 501 F. Supp. 105, 110 (D. Nev. 1980) (Nevada Department of Prisons regulation which denied women the right to marry prison inmates held to be unconstitutional interference with the fundamental right to marry); CAL. PENAL CODE § 2601 (f) (West 1982) (asserting prisoner's right to marry); see generally, *Hardwick*, *supra* note 3, at 277-78.

8. *Inmate and Wife Seek Right to Conceive Child*, N.Y. Times, Sept. 20, 1987, at 43, col. 1. In August, 1987, Steven Goodwin brought a habeas corpus action in federal district court, Springfield, Missouri, against the United States Bureau of Prisons and Attorney General Edwin Meese, III. *Id.* He had been refused doctor's assistance in collecting his sperm at the prison so it could be frozen and shipped to St. Louis, where Mrs. Goodwin's doctor would take over. *Id.* The Goodwins offered to pay any costs, which could reach \$400. *Id.* The magistrate assigned to hear the action ruled in Goodwin's favor. Telephone interview with Ron Kuby, Esq., counsel for Steven Goodwin (Nov. 10, 1988). The government challenged the magistrate's finding, and Judge Collinson of the federal district court has not yet rendered a decision in the appeal. *Id.*

After filing suit, Goodwin was contacted by Tricia McGilliard, a woman whose husband was a prisoner in Oregon. She informed Goodwin that she and her husband had requested and received permission to undergo the artificial insemination procedure. Telephone interview with Steven Goodwin (Nov. 9, 1988).

is likely to spend the next eight or nine years in prison.⁹ Since his wife is presently 28 years old, the couple believes that delaying pregnancy until her middle or late thirties would be medically risky.¹⁰ The federal prison system has no official policy on artificial insemination at this time,¹¹ and Goodwin's suit challenges this lack of policy.

The question raised by this suit is whether and to what extent prisoners should retain marital and procreative rights, and if such rights are retained, whether they should encompass the freedom to use non-traditional means of procreation. An attempt to answer this question requires a review of the origins of marital and procreative rights as they apply to all citizens, and to prison inmates in particular.

Part I of this Comment considers the right to marry. It briefly explores the origin of this right as it applies to the general citizenry, analyzes the standard for restricting prisoners' marital rights, and discusses the extent of a prisoner's right to marry in view of this restrictive standard.

Part II discusses the origin and extent of procreative rights. Applying the standard of review for protecting prisoners' marital rights, it analyzes some of the arguments for and against allowing procreative options for prisoners. The discussion considers artificial insemination, surrogate motherhood, conjugal visitation, and their impact on the goals of prison administrators.

Part III concludes that, for the majority of prisoners, denial of the right to engage in artificial insemination and surrogate motherhood as alternative means of procreation bears no rational relation to the furtherance of any legitimate penological objective and represents an impermissible burden on prisoners' rights.

9. Telephone interview with Steven Goodwin (Nov. 9, 1988). Steven Goodwin was recently denied parole, and expects that he will serve at least four or five more years in prison.

10. *Id.* Although Mrs. Goodwin has one child from a previous marriage, the Goodwins would like to have children as a couple. Mrs. Goodwin's prior pregnancy was accompanied by medical problems, including the loss of one ovary.

11. *Inmate and Wife Seek Right to Conceive Child*, *supra* note 8, at 43, col. 1.

I. THE EXTENT OF PRISONERS' MARITAL RIGHTS TODAY

A. *The Origin of the Right to Marry*

The decision to marry is considered a fundamental constitutional right,¹² based on the rights of privacy, equal protection, and due process.¹³

In *Loving v. Virginia*,¹⁴ the Supreme Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹⁵ The Court described marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."¹⁶ In *Loving*, the Court invalidated a statutory scheme adopted by the state of Virginia, which prevented "marriages between persons solely on the basis of racial classifications."¹⁷ Although the Court agreed with the Supreme Court of Appeals of Virginia that "marriage is a social relation subject to the State's police power,"¹⁸ it went on to establish that the states' powers to regulate are subject to the strictures of the fourteenth amendment.¹⁹ The Court concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."²⁰

A number of cases have also declared that the right to marry is a protected liberty interest. In *Loving*, the Court concluded that the couple involved had been deprived of the freedom to marry, a fundamental liberty protected by the due process clause.²¹ In *Griswold v. Connecticut*,²² the right to marry was included in the fundamental "right of privacy" implicit in the fourteenth amendment's due pro-

12. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (asserting that marriage is a fundamental freedom).

13. *Id.* at 12.

14. 388 U.S. 1 (1967).

15. *Id.* at 12.

16. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and *Maynard v. Hill*, 125 U.S. 190 (1888)).

17. *Id.* at 2. At the time of this decision, Virginia was one of sixteen states which prohibited marriages on the basis of racial classifications. *Id.* at 6.

18. *Id.* at 7 (citing *Maynard v. Hill*, 125 U.S. 190 (1888)).

19. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

20. *Id.* at 12.

21. *Id.*

22. 381 U.S. 479 (1965).

cess clause,²³ and in *Roe v. Wade*,²⁴ Justice Stewart asserted in his concurring opinion that an individual's "freedom of personal choice in matters of marriage and family life is" central among due process liberties.²⁵

In *Zablocki v. Redhail*,²⁶ the Supreme Court struck down a Wisconsin statute which provided that "members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry."²⁷ The Court asserted that its "past decisions ma[d]e clear that the right to marry is of fundamental importance"²⁸ and the Wisconsin statutory restriction significantly interfered with that right.²⁹ The Court observed that "the decision to marry has been placed on the *same* level of importance as decisions relating to *procreation*, childbirth, child rearing, and family relationships."³⁰

However, in "reaffirming the fundamental character of the right to marry,"³¹ the Court did not suggest that "every state regulation which relates in any way to the incidents of or prerequisites for marriage"³² must be rigorously scrutinized. "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."³³

23. *Id.* at 485 (stating "the right of privacy which presses for recognition here is a legitimate one").

24. 410 U.S. 113 (1973) (Stewart, J., concurring). Over the years, the Supreme Court has fostered a growing acceptance of the notion of privacy as a constitutionally protected entitlement, despite the outrage voiced by the strict constructionists, who recoil at the notion because they can find no explicit reference to any such right in the text of the Constitution. *Id.* at 152.

In his dissenting opinion, Justice Rehnquist, argued that the abortion transaction is not "private" in the ordinary usage of that word," nor is it even a "distant relative of the freedom from searches and seizures protected by the Fourth Amendment." *Id.* at 172 (Rehnquist, J., dissenting). However, it is well beyond the scope of this discussion to attempt to trace the gradual emergence of the privacy right or to select from among the various theories which account for its existence.

25. *Id.* at 169 (Stewart, J., concurring).

26. 434 U.S. 374 (1978).

27. *Id.* at 375. The class was defined as any "'Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment'." *Id.*

28. *Id.* at 383.

29. *Id.*

30. *Id.* at 386 (emphasis added). Thus, in *Zablocki*, the Court recognized that marriage and procreation have *equal* importance. This is significant since it suggests that the two rights should receive substantially similar protection.

31. *Id.*

32. *Id.*

33. *Id.*

In sum, the right to marry is considered fundamental, but it is subject to reasonable regulation by the states. The Court has been vigilant in protecting the free exercise of marital rights for the general citizenry and has invalidated regulations which constitute significant interference.

B. The Constitutional Standard for Restricting Prisoners' Marital Rights

The Supreme Court's recently adopted standard of review for prisoners' constitutional complaints against restrictive prison regulations is set forth in *Turner v. Safley*.³⁴ It reveals a predictable reluctance on the part of the Court to interfere in prison administration.

In *Turner v. Safley*, the Court identified several factors relevant to determining the reasonableness of a prison regulation. First, there must be a valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. A second factor is whether alternative means of exercising the right remain open to inmates. Finally, a court must consider 'the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.'³⁵

To apply the standard, the Court first determines whether a fundamental right has been implicated by a particular regulation.³⁶ If so, the Court then considers whether the restriction constitutes a permissible or impermissible burden on the right, under the reasonable relation standard.³⁷ The Court asks whether the restrictive regulation bears a rational relation to a legitimate penological objective,³⁸ such as security, safety, rehabilitation, or deterrence.³⁹ If such a relationship exists, the regulation will be upheld if the means used to achieve the objective is not arbitrary or capricious and furthers that goal in some way.⁴⁰

This standard of review uses the lowest level of scrutiny employed by the Court to decide constitutional issues.⁴¹ A high level of defer-

34. 482 U.S. 78 (1987); see also *O'Lone v. Estate of Shabazz*, 107 S. Ct. 2400 (1987).

35. *Sturm v. Clark*, 835 F.2d 1009, 1013-14 (3d Cir. 1987).

36. *Turner*, 482 U.S. at 84.

37. *Id.* at 87-90.

38. *Id.* at 89.

39. Jones, *Fourth Amendment Rights for Prisoners: An Unreasonable Expectation?*, 27 ARIZ. L. REV. 477, 480 (1985).

40. *Turner*, at 90-91.

41. *Id.*

ence to the wisdom of prison officials is obvious throughout the Court's analysis.⁴²

The low level of scrutiny and high measure of deference adopted by the Court when considering the fundamental rights of prisoners has been sharply criticized. Justice Stevens, dissenting in *Turner*, argued that the logical connection standard applied by the majority renders the Court's scrutiny virtually meaningless.⁴³ "Application of the 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."⁴⁴ Stevens advocated that the Court adopt a different standard, such as that used by Judge Kaufman in *Abdul Wali v. Coughlin*.⁴⁵ Justice Stevens praised Judge Kaufman's approach as being "a more careful attempt to strike a fair balance between legitimate penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration."⁴⁶

In *Abdul Wali*, several inmates of correctional facilities in New York sought a preliminary injunction to enjoin prison administrators from withholding copies of a report criticizing conditions at the Attica Correctional Facility.⁴⁷ Judge Kaufman affirmed the grant of an injunction, stating that courts which simply acquiesce in administrative decisions where precious constitutional rights are being abridged are abrogating their responsibility and have a duty to intervene.⁴⁸

He applied a four-part analysis similar to that used in *Turner*: he considered the nature of the right asserted; the type of activity in question; whether the regulation worked a total deprivation or a mere limitation of the right; and finally, whether any less restrictive alternatives existed.⁴⁹ When the activity the prisoner sought to engage in was not presumptively dangerous, and the regulation worked a total deprivation of the means of exercising that right, the prison officials, Judge Kaufman reasoned, should have the burden of establishing that the restriction was "necessary to further an important

42. *Id.*; see, e.g., *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119 (1977) (wide-ranging deference accorded decisions of prison administrators).

43. *Turner*, 482 U.S. at 100 (Stevens, J., concurring in part and dissenting in part).

44. *Id.* at 100-01.

45. 754 F.2d 1015, 1033 (2d Cir. 1985).

46. *Turner*, 482 U.S. at 101 n.1 (Stevens, J., concurring in part and dissenting in part).

47. 754 F.2d at 1015.

48. *Id.* at 1018.

49. *Id.* at 1033.

governmental interest, and that limitations on freedoms occasioned by the restriction were no greater than necessary to effectuate the governmental objective involved."⁵⁰ This test, which employs a heightened level of scrutiny, requires more than a mere perfunctory showing by prison administrators to justify their actions. The burden of proof rests on the shoulders of the officials, who are in the best position to justify their actions.

Prison officials are, no doubt in the best position to make administrative decisions and courts may properly show a measure of deference in this respect. But when such decisions impose unnecessary restrictions on fundamental constitutional rights, courts should consider themselves obligated to intervene.⁵¹ Although *Abdul Wali* involved first amendment rights, which are arguably entitled to greater protection than are marital rights, both would benefit from heightened judicial scrutiny.⁵² Judge Kaufman's standard is preferable to the Supreme Court's present analysis because it encourages the court to engage in a meaningful, rather than superficial, analysis of the deprivation in question.

Nevertheless, for the present, the Court will apply its lower standard of review. The question remains whether such a test actually affords sufficient protection of prisoners' fundamental guarantees or whether it is merely a means of placing a judicial stamp of approval on the acts of prison officials.

C. *The Extent of the Prisoners' Right to Marry*

Prisoners in this country were once considered non-persons, a concept which dates back to Greco-Roman times.⁵³ Over the past century, this perception has steadily eroded.⁵⁴ The Supreme Court has

50. *Id.*

51. *Id.* at 1015.

52. *Turner v. Safley*, 482 U.S. 78, 116 (1987) (Stevens, J., concurring in part and dissenting in part) (arguing that while "the text of the Constitution more clearly protects the right to communicate than the right to marry . . . both of these rights should receive constitutional recognition and protection").

53. See *Convict Fights State Lifer Ban*, *Newsday*, November 10, 1987, at 19, col. 1; see also Hull, *The Discovery of Prisoners' Rights: A Sociological Analysis*, in *LEGAL RIGHTS OF PRISONERS* (G. Alpert, ed. 1980) (suggesting that the courts are in the process of modifying the original view of prisoners as "slaves of the state," (citing *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871), and the landmark decision which began such modification, *Coffin v. Reichard*, 143 F.2d 443, 445 (9th Cir. 1944))).

54. See, e.g., *Thompson v. Bond*, 421 F. Supp. 878 (W.D. Mo. 1976) (invalidating Missouri civil death statute which deprived all state prisoners of the right to file any civil action in the state courts as violative of due process and the first amendment right to petition the government for redress of grievances); *Delorme v. Pierce Freightlines Co.*, 353 F. Supp. 258 (D. OR.

come to recognize an expanding variety of constitutional rights which prisoners retain after incarceration, including the right to marry.⁵⁵ However, the Court has taken care to limit the rights which are retained to those consistent with legitimate penological objectives.⁵⁶

A number of states have attempted to impose stringent restrictions on the right of the prisoners to marry.⁵⁷ Most recently, in *Turner v. Safley*,⁵⁸ the Supreme Court struck down a Missouri inmate mar-

1973) (Oregon civil death statute prohibiting imprisoned felons from pursuing administrative or judicial claims found violative of equal protection); *Ferrin v. New York State Dep't of Correctional Servs.*, 71 N.Y.2d 42, 47, 517 N.E.2d 1370, 1373, 523 N.Y.S.2d 485, 488 (1987) (referring to the marriage ban for life prisoners as a "last significant vestige of civil death").

55. *Turner v. Safley*, 482 U.S. 78 (1987) (holding that inmate marriage regulation was not reasonably related to any legitimate penological objective); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (physical liberty cannot be further curtailed unless the demands of due process are satisfied); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that a prisoner is not stripped of constitutional protection and that prison disciplinary proceedings need not possess the full panoply of rights but must include generally applicable constitutional requirements); *Johnson v. Avery*, 393 U.S. 483 (1969) (right to petition the government for redress of grievances); *Lee v. Washington*, 390 U.S. 333 (1968) (recognizing that the fifth and fourteenth amendments entitle prisoners to equal protection and due process, and that prisoners cannot be subjected to invidious racial discrimination); *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854 (4th Cir. 1975) (inmates retain eighth amendment protection against cruel and unusual punishment); *see also Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to an inmate's serious injury or illness constitutes cruel and unusual punishment in violation of the eighth amendment); *Haines v. Kerner*, 404 U.S. 519 (1972) (inmate's complaint seeking to recover damages for physical injuries and deprivation of rights should not have been dismissed without providing an opportunity for the inmate to present evidence regarding these claims); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (holding that inmates' constitutional rights were violated by racial segregation, inadequate diet, overcrowding, unsanitary conditions, and other poor conditions within prison); *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979) (overcrowding violated constitutional rights of inmates). *But see Ortega v. Rowe*, 796 F.2d 765 (5th Cir. 1986) (eighth amendment held inapplicable to conditions of alien detention in jails used by border patrol because imprisonment was not a result of any criminal conviction), *cert. denied*, 481 U.S. 1013 (1987); *Bruscino v. Carlson*, 43 Crim. L. Rep. (BNA) 2371 (July 22, 1978) (permanent lockdown used to curb widespread inmate violence, including nearly continuous confinement to cells, frequent body cavity searches, use of shackles for discipline and ban on group activities, while considered "sordid and horrible" did not amount to cruel and unusual punishment).

56. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Some of the most significant rights which are maintained are those which flow from the first amendment. *See, e.g., Turner v. Safley*, 482 U.S. 78, 91-93 (1987) (screening procedure allows the administration to effectively guard against prison uprisings, communication between prison gang members, escape plots, assaults, and other acts of violence, but limitations imposed must stem from legitimate and primary penological objectives, such as "institutional order and security"). Significantly, the regulation in *Turner* protects communication between inmates and their families, thus recognizing the importance of familial contact. *Id.*; *see also Bell v. Wolfish*, 441 U.S. 520 (1979) (mail rights may be limited by screening procedures); *Leonard v. Norris*, 797 F.2d 683 (8th Cir. 1986) (right to send and receive mail).

57. *See supra* note 6 and accompanying text.

58. 482 U.S. 78 (1987).

riage regulation, holding that it constituted an impermissible burden on the prisoners' constitutional right to marry.⁵⁹ The Court expressly stated that *Zablocki* applied to prison inmates,⁶⁰ announcing as settled that "a prison inmate 'retains those . . . rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'"⁶¹

However, the Court noted that the marital right is "subject to substantial restriction as a result of incarceration."⁶² Despite the limitations imposed as a result of incarceration, the Court asserted that many of the important attributes of marriage remain, including emotional support, public commitment, spiritual significance, and the hope of full consummation of the relationship in the future.⁶³ "These incidents of marriage . . . are unaffected by the fact of confinement or the pursuit of legitimate corrections goals."⁶⁴

State and federal prisons are subject to a variety of regulations which restrict marriage by inmates.⁶⁵ The Federal Bureau of Prisons, which manages and regulates all federal penal and correctional institutions, has enacted a number of marriage regulations governing eligibility and permission procedures. These rules liberally permit most federal inmates to marry, except where a "legal restriction to the marriage exists, or where the proposed marriage presents a threat to the security or good order of the institution, or to the protection of the public."⁶⁶ To marry, the inmate must be legally eligible and mentally competent,⁶⁷ and the intended spouse must verify his or her intent to marry the inmate.⁶⁸

While the federal marriage regulations are generally permissive, not all state jurisdictions are in agreement over which inmates

59. *Id.* at 99-100. The regulation allowed an inmate to marry "only with the permission of the superintendent of the prison." *Id.* at 96. It further provided that "such approval should be given only 'when there are compelling reasons to do so.'" *Id.* (cite omitted) Although the regulation did not define the term "compelling", prison officials testified that "generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.* at 96-97.

60. *Id.* at 95.

61. *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

62. *Id.* As a rather obvious example, prisoners are not free to live with their spouses or visit them free of all restrictions. Such restrictions are necessary incidents of incarceration and further legitimate correctional goals such as retribution and security.

63. *Id.*

64. *Id.*

65. See, e.g., 18 U.S.C. § 4042 (1968); CAL. PENAL CODE § 2601 (E) (West 1982); N.Y. CIV. RIGHTS LAW § 79-2 (McKinney 1976); R.I. GEN. LAWS § 15-5-1 (1956).

66. 28 C.F.R. §§ 551.10-16 (1984).

67. *Id.* at §§ 551.12(a),(b).

68. *Id.* at § 551.12 (c).

should be permitted to marry. For example, the New York Court of Appeals recently upheld a ban on marriages of state prison inmates serving life sentences.⁶⁹ In *Ferrin v. State Department of Correctional Services*,⁷⁰ Judge Joseph Bellacosa, writing for a unanimous court, stated that “[w]hile there may be competing policy arguments and modern penological and societal reasons for ending this last vestige of civil death for lifers, these are matters which in these circumstances must be left to the Legislature to resolve.”⁷¹

The court declared itself bound by the New York Civil Rights Law, Section 79-a, which provides that “a person sentenced to imprisonment for life is thereafter deemed civilly dead,”⁷² meaning that he is incapable of contracting to marry. The exception to the rule is that “such a person may marry while on parole . . . if otherwise capable of contracting a valid marriage.”⁷³ Ferrin’s marriage was declared void from its inception, because he had been sentenced to life imprisonment before he was married. The New York Court of Appeals also upheld the lower court’s denial of conjugal visits to Ferrin, who was sentenced to a twenty-year-to-life term for murder.⁷⁴

Ferrin was married by a prison chaplain three years after his sentencing.⁷⁵ He had been allowed conjugal visits with his wife while he was incarcerated at Attica in 1978 and 1979, but he was denied further visits when he reapplied for them in 1984.⁷⁶ Ferrin raised no constitutional challenge to the marriage ban itself.⁷⁷ Rather, he focused on the 1981 amendments to the Civil Rights Law, which provided that an existing marriage of a life prisoner would not be considered void after he was sentenced to a life term.⁷⁸ Judge Bellacosa stated that the amendment was meant to apply only to those prisoners who were married *before* the sentence was imposed and did not apply to a “civilly dead inmate” who attempted marriage *after* imposition of a life sentence.⁷⁹

69. *Ban on Marriages Is Upheld For Prisoners Serving Life*, N.Y.L.J., Dec. 22, 1987, at 1, col. 3.

70. 71 N.Y.2d 42, 517 N.E.2d 1370, 523 N.Y.S.2d 485 (1987).

71. *Id.* at 47, 517 N.E.2d at 1373, 523 N.Y.S.2d at 488.

72. *Id.* at 45-47, 517 N.E.2d at 1372-73, 523 N.Y.S.2d at 486-87.

73. *Id.* at 45, 517 N.E.2d at 1372, 523 N.Y.S.2d at 486.

74. *Id.* at 44, 517 N.E.2d at 1371, 523 N.Y.S.2d at 485.

75. *Id.* at 44, 517 N.E.2d at 1372, 523 N.Y.S.2d at 486.

76. *Id.*

77. *Id.*

78. *Id.* at 44-45, 517 N.E.2d at 1371-72, 523 N.Y.S.2d at 486-87.

79. *Id.* at 46, 517 N.E.2d at 1372, 523 N.Y.S.2d at 487. The New York Court of Appeals subsequently relied on its holding in *Ferrin* to uphold denial of conjugal visitation rights to another inmate, who had entered into an out of state proxy marriage while serving a life term.

Thus, in New York, a life sentence does not operate to nullify an *existing* marriage, but it does render void a marriage which takes place *after* a life sentence has been imposed.

With the exception of prisoners sentenced to life, the right of a prisoner to decide whether to marry has generally enjoyed substantial protection throughout the United States. On the other hand, restrictions which govern the incidents of marriage, such as conjugal visitation, or which are procedural in nature, such as permission-granting requirements and rules governing the time and place of the marriage, have been uniformly upheld.⁸⁰ Invidious classifications, however, which severely restrict or prohibit certain classes of prisoners from marrying have been struck down.⁸¹ The question of whether prisoners should retain some measure of procreative rights incidental to or in addition to marital rights remains.

II. PROCREATION AND THE PRISONER

A. *The Origin and Extent of Procreative Rights for Non-Prisoners*

In recent years, procreative rights have been a hotly debated topic, largely due to the 1973 decision in *Roe v. Wade* which legalized abortion.⁸² The Supreme Court has recognized procreative rights both in conjunction with marital rights *and* as a separate entitlement, in *Zablocki*,⁸³ *Roe*,⁸⁴ and *Skinner v. Oklahoma*.⁸⁵

The Supreme Court recognized the right to procreate as incidental to marital rights in *Zablocki*, stating, "if appellee's *right to procreate* means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."⁸⁶ In *Roe*, the Court held that the "right of

in *Miner v. State Dep't of Correctional Servs.*, 70 N.Y.2d 909, 519 N.E.2d 301, 524 N.Y.S.2d 390 (1987).

80. See *supra* note 6 and accompanying text.

81. See *supra* note 7 and accompanying text; see also *Salisbury v. List*, 501 F. Supp. 105 (D. Nev. 1980).

82. 410 U.S. 113 (1973). Although "[t]he right to procreate was given a shot in the arm by *Roe* . . . and its progeny," Williams, *Differential Treatment of Men and Women by Artificial Reproduction Statutes*, 21 TULSA L. J. 463, 481 (1986), the composition of the present Supreme Court has prompted much speculation about the longevity of the *Roe* precedent. Justice Blackmun has, himself, suggested that *Roe* might be overturned this year. *A Judicial Tilt to the Right*, *Newsday*, Oct. 23, 1988, at Ideas 1, col. 4.

83. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

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

85. 316 U.S. 535 (1942).

86. *Zablocki*, 434 U.S. at 386, (emphasis added) "[T]he right to marry is part of the fundamental 'right to privacy'" *Id.* at 384.

privacy, . . . founded in the fourteenth amendment's concepts of personal liberty and restrictions upon state action, . . . encompass[es] a woman's decision whether or not to terminate her pregnancy."⁸⁷ In *Skinner*, the right to procreate was not viewed as merely important; it was considered a basic, fundamental civil liberty. The Court reasoned that strict scrutiny was "essential" in reviewing a classification used by the state of Oklahoma which provided for compulsory sterilization of certain prisoners.⁸⁸

On the other hand, while *Roe* and *Griswold v. Connecticut*⁸⁹ established the right *not* to procreate, these decisions did not discuss whether there was an affirmative right to reproduce.⁹⁰ This is a significant distinction in terms of the utility of the *Roe* analysis in cases involving alternative means of reproduction. One scholar has argued that simply because one is free to have sex which does not result in reproduction does not mean that there is also a right to procreate *without having sex*.⁹¹ However, he asserts that "[f]ull procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses."⁹² This approach, while persuasive, has yet to be embraced by the Court.

B. Using the Turner Standard to Analyze Arguments For and Against Procreative Freedom For the Prisoner

Since procreative rights flow from the right of privacy and are closely intertwined with marital rights, it follows that where marital and privacy rights are protected, procreative rights should be afforded similar protection.⁹³ Although the Court has recognized some

87. *Roe*, 410 U.S. at 152-53 ("The right [to privacy] has some extension to activities relating to marriage . . .").

88. *Skinner*, 316 U.S. at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man Marriage and procreation are fundamental . . .").

89. 381 U.S. 429 (1965).

90. Williams, *supra* note 82, at 481.

91. *Id.*

92. *Id.* (emphasis added).

93. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *see supra* note 29 and accompanying text; *see generally*, Williams, *supra* note 82. This argument, however, does not extend to general privacy rights for prisoners. An especially strong indication of the Court's current reticence in the area of prisoners' general privacy rights can be found in its recent holding in *Hudson v. Palmer*, 468 U.S. 517 (1984). In this widely criticized decision, the Court significantly cut back on prisoners' privacy rights with respect to searches and seizures in a prisoner's cell. The Court cited two reasons to justify restriction of prisoners' privacy rights in this area. First, "[t]he curtailment of certain rights is necessary . . . to accommodate a myriad of 'institutional needs and objectives,' . . . chief among which is internal security." *Id.* at 524 (cita-

privacy and marital rights for prisoners, it has never attempted to delineate the proper standard of review for determining the extent of prisoners' procreative rights.

Certain aspects of procreative freedom are already protected for prisoners. This is evidenced in the prison regulations established by the Federal Bureau of Prisons, which deal, for example, with the right of a female prisoner who becomes pregnant while in prison to choose either to carry the child to term or undergo an abortion.⁹⁴ Since some measure of procreative rights are already recognized for inmates, the issue is the extent to which prisoners should retain reproductive freedom.

A strong argument can be made that even the least demanding constitutional analysis should result in a substantial measure of reproductive freedom for most inmates. Applying the reasonable relation standard used by the Court in *Turner v. Safley* in the context of prisoners' procreative rights, the first step is to determine what legitimate goal is served by prohibiting the exercise of these rights. If there is a legitimate goal, the question becomes whether the means of achieving the goal is reasonably related to the objective.

Those critical of allowing prison inmates to exercise many of the constitutional rights guaranteed to nonincarcerated individuals argue that certain fundamental rights should be denied as part of the punishment itself.⁹⁵ They claim that a number of important goals are

tions omitted). Second, restrictions on an inmate's rights "serve . . . as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction." *Id.* Chief Justice Burger argued that "privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 526 (emphasis added). The question concerning privacy rights not relating to prisoners in their individual cells should therefore require a somewhat different analysis. Institutional security is the main goal sought to be preserved in *Hudson*, whereas certain types of procreative freedom, such as artificial insemination and surrogate motherhood, could be enjoyed with a minimal effect on security. The penal goals identified by the Chief Justice were, first, to grant rights which would not interfere with institutional security to inmates and, second, to allow prison administrators the means to ensure security. *Id.* at 527-28. In the context of searches and seizures in prison cells, the Court found that, consistent with these goals, fourth amendment protections could be denied to prisoners. *Id.* However, the Court did not discuss whether other privacy rights must necessarily be denied under the same analysis.

94. 28 C.F.R. § 551.23 (a) (1986) ("The inmate has the responsibility to decide either to have an abortion or to bear the child."); see also *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (order requiring inmates to secure court-ordered releases to obtain abortion while in county's custody was held unconstitutional; and to the extent county's regulation requiring inmates to obtain their own financing for abortion impinged upon inmate's right to make abortion choice, regulation was held unconstitutional); 28 C.F.R. § 551.21 (1986) (medical staff must provide advice on birth control and, where appropriate, prescribe and provide methods for birth control).

95. Williams, *supra* note 82, at 480-81.

served thereby, including security, rehabilitation, deterrence, and administrative convenience.⁹⁶ A close analysis of this argument, however, reveals that none of the administrative goals involved constitutes a rational basis for a *total ban* on reproductive activity for all prisoners.

Historically, there have been several approaches used to deny reproductive rights to prisoners. One means of preventing certain types of offenders from reproducing, in an attempt to curb future crime, was to permit prisoner sterilization. But in *Skinner v. Oklahoma*, the Supreme Court struck down Oklahoma's Habitual Criminal Sterilization Act, which provided for compulsory sterilization of repeat offenders convicted of crimes involving moral turpitude.⁹⁷

While the Court used an equal protection analysis to invalidate the statute,⁹⁸ the question of whether prisoner sterilization was a legitimate means of preventing future crime troubled at least two members of the Court. In his concurring opinion, Chief Justice Stone discounted the notions that criminal behavior had been scientifically proven to be genetically transmissible and that sterilization was therefore an appropriate means of reducing crime.⁹⁹ Justice Jackson raised similar concerns in his concurrence.¹⁰⁰ He warned that "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity

96. Jones, *supra* note 39, at 477-78.

97. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking as unconstitutional the Habitual Criminal Sterilization Act, Okla. Stat. Ann. tit. 57 §§ 171-195 (West 1969)).

98. *Id.* at 541.

99. *Id.* at 545 (Stone, C.J., concurring).

[While] science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable . . . the state does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable.

Id.

Although Justice Stone acknowledged that the state had the power, after appropriate inquiry, to sterilize certain classes of institutionalized persons, he argued that, at a minimum, procedural due process would require a hearing to determine whether or not the characteristics in question were transmissible. *Id.* at 544. (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding power of state to provide for sexual sterilization of inmates in state-supported institutions to be within power of state under fourteenth amendment, and failure to extend provision to persons outside institutions did not violate equal protection clause)).

100. *Id.* at 546 (Jackson, J., concurring). He noted that "the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other questions of constitutional gravity." *Id.*

and personality and natural powers of a minority — even those who have been guilty of what the majority define as crimes.”¹⁰¹

A second method of preventing prisoners from procreating is the denial of conjugal visitation rights. Critics of conjugal visitation argue that denial of the right to enjoy the comforts of the marital and familial relationships should serve as a deterrent and a form of retribution, if not for all types of offenders, at least for particular groups.¹⁰² While denial of conjugal visitation to certain types of prisoners is certainly more defensible than compulsory sterilization, it still fails to provide a valid excuse for denying other forms of procreative freedom to most inmate classifications.

Other arguments can be advanced to deny prisoners the use of various procreative alternatives. One such argument centers on the prisoner's inability to benefit from procreative freedom. In *Turner*, the state raised the argument that the right to marry should be extensively curtailed because prisoners cannot benefit from the normal intimacies while in prison.¹⁰³ A similar argument might be raised in the realm of procreative rights. Since the prisoner is unable to share in many familial intimacies, such as watching the growth and development of his child on a daily basis, denying him the right to procreate is a reasonable restriction, because the right is of no use to him. However, the argument, raised by the state and rejected by the Supreme Court in *Turner*, is equally unconvincing when applied to procreative rights.

Simply because the prisoner-parent will be unable to share in and benefit from the day-to-day joys and concerns of raising a child, the right to have the child should not be denied. Just as there are certain incidents of marriage which remain unaffected by the realities of incarceration,¹⁰⁴ many of the joys of parenthood would similarly survive the period of separation which is necessitated by the prison sentence. While the prison administrator may consider the best interests

101. *Id.*

102. Esposito, *Conjugal Visitation in American Prisons Today*, 19 J. FAM. L. 313, 323 (1980-81). For example, in the case of a rapist or a prisoner who has assaulted his wife, denial of contact with a mate may be essential for reasons of physical safety. However, mere sexual activity is distinguishable from procreative activity and may be treated differently. The prison official may have a legitimate interest in disallowing general sexual activity, even though such activity is arguably protected as part of the right of privacy. The Court has recognized marital and procreative rights, but not an affirmative right to engage in mere sexual activity. *In re Goalen*, 30 Utah 2d 27, 517 P.2d 1028 (1973) (state has right under police power to prevent a convicted “sex deviate” from reproducing), *cert. denied*, 414 U.S. 1148 (1974); see also Hardwick, *supra* note 3, at 279.

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

104. *Id.*

of the prisoner, the prisoner's spouse, and any potential offspring, such personal choices as to whether or not to have children should not be left entirely up to the paternalistic inclinations of prison officials.¹⁰⁵

One major concern which arises, is the problem of the indigent prisoner and his inability to provide monetary support to his spouse and children. Since many inmates are incapable of providing for their families, their spouses and offspring must often resort to welfare for support. Should society have to shoulder the burden of providing for the children of inmates who choose to procreate regardless of the social and economic consequences? On the one hand, it would appear that a distinction between indigent inmates and other inmates with respect to the ability to exercise procreative freedom might be deemed a permissible form of social or economic regulation.¹⁰⁶ According to the Court, "poverty, standing alone, is not suspect classification."¹⁰⁷

By contrast, Justice Marshall has advanced the opinion that indigency, as a classification, should be subject to heightened scrutiny under an equal protection analysis.¹⁰⁸ Employing his analysis, it would fly in the face of equal protection to argue that indigents, whether in or out of prison, should have less of a right to procreate by virtue of their inability to adequately support their children.¹⁰⁹ Justice Marshall's reasoning, however, has not persuaded the remainder of the Court.

Another factor which must be addressed is the likelihood of a ripple effect to procreate, in other words, whether accommodating an inmate's right will have a significant impact on fellow prisoners or prison staff.¹¹⁰ The modern alternatives to traditional reproduction appear unlikely to cause any appreciable ripple effect. First, prisoners who are permitted to engage in conjugal visitation would normally have no reason to seek any alternative means of reproduction.

105. *See id.* at 99.

106. *See Ortwein v. Schnab*, 410 U.S. 656, 660 (1973).

107. *Maher v. Roe*, 432 U.S. 464, 471 (1977).

108. *See Beal v. Doe*, 432 U.S. 438, 454 (1977) (Marshall, J. dissenting); *Ortwein v. Schnab*, 410 U.S. 656, 665 (1973) (Marshall, J. dissenting).

109. *Id.*; *see also* R. LEE, *FEDERAL PRISONS: FACT AND FICTION* 127 (1987) (inmates often cannot provide for destitute families and are relegated to limited physical contact with spouses or lovers). Other scholars have also recognized a potential equal protection problem with respect to the wealthy/indigent prisoner dichotomy and the prisoner's ability to obtain independent diagnostic treatment and care beyond that afforded by prison authorities. D. RUDOVSKY, A. BRONSTEIN, & E. KOREN, *THE RIGHTS OF PRISONERS* 92 (1983 rev. ed.).

110. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

Second, some prisoners may consider any method other than the traditional means of conception to be morally unacceptable.¹¹¹ Still others, whose prison terms are not lengthy, may not feel pressured by time constraints to begin a family during the period of incarceration. Allowing the few interested prisoners to exercise the right to procreate through some alternative method of conception would have little or no impact on other prisoners or prison staff.

A major concern in the area of procreation, as in the realm of marital rights, is that a restriction on the prisoner's rights also constitutes an infringement of the rights of the non-prisoner spouse.¹¹² It has been asserted that courts should properly consider the effects on the *spouse's* rights when reviewing the constitutionality of a prison regulation.¹¹³ In fact, the Court has used this perspective to invalidate certain restrictions on prisoners' rights in previous cases involving prisoner mail¹¹⁴ and marital rights.¹¹⁵

One argument in favor of allowing some reproductive choice for inmates is that there may be positive rehabilitative effects. Rehabilitation and the prevention of recidivism are two important correctional goals.¹¹⁶ Therefore, prison officials should encourage programs which promote these objectives.¹¹⁷ Two of the most common problems which prison inmates face are the loss of self esteem and ego degradation.¹¹⁸ Feelings of inadequacy, helplessness, and the lack of intimate contact with loved ones add to the psychological pressures which confront inmates.¹¹⁹ These problems, of course, affect the inmate's family as well, causing a strain on familial relationships.¹²⁰

Allowing prisoners to enjoy marriage and procreation may help to strengthen bonds between the prisoner and his loved ones, and serve as reassurance that the relationship will survive the period of incarceration.¹²¹ Increased sensitivity on the part of prison administrators

111. See Williams, *supra* note 82, at 465-67.

112. Hardwick, *supra* note 3, at 275.

113. *Id.*

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

115. Hardwick, *supra* note 3, at 276.

116. R. LEE, *supra* note 109, at 126.

117. *Id.* at 126-27.

118. *Id.* at 103; see also 28 C.F.R. § 540.40 (1980) (Federal Bureau of Prisons encourages visiting by family and friends "to maintain the morale of the inmate and to develop closer relationships between the inmate and family members," but permits the Warden to restrict visiting "when necessary to insure the security and good order of the institution").

119. R. LEE, *supra* note 109, at 104.

120. *Id.* at 105-06.

121. *Id.* at 106.

and officials could foster the growth of prisoners' familial relationships.¹²²

"Hopes and dreams, shared with loved ones who are supportive, give the inmate a goal to strive toward."¹²³ The 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. While the "realities of imprisonment seem more directed toward an emphasis on punishment,"¹²⁴ a more equitable balance between retribution and rehabilitation would appear to offer a better approach to reducing recidivism.¹²⁵

C. Procreative Alternatives and the Goals of the Prison Administrator

The primary goal of prison administrators is institutional security.¹²⁶ Whether this goal is furthered by denying a prisoner the right to procreate depends in part on the means used to reproduce. For prisoners, potential options include the traditional means of reproduction during conjugal visitation, artificial insemination, and surrogate motherhood.

In the case of conjugal visitation, which enables a prisoner to engage in the normal intimacies of the marital relationship, certain prison administrations provide private visitation rooms or units to prisoners and their spouses.¹²⁷ Many prisons have been successful in implementing conjugal visitation programs with little or no threat to institutional security.¹²⁸ However, there is the possibility that security concerns could be implicated merely by virtue of the transportation of prisoners or because private contact with the spouse could

122. *Id.*

123. *Id.* at 107.

124. *Id.* at 126.

125. *Id.* at 126-27. On the other hand, when a prisoner ultimately returns to his family and is faced with the prospect of supporting not only his wife, but his children, he may feel even more pressured to resort to crime in order to support his family. It is therefore unclear whether procreative freedom would positively or adversely affect rates of recidivism, or how a link between procreation and recidivism could ever be definitively established.

126. *Turner v. Safley*, 482 U.S. 78, 91-98 (1987); *see also Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977); *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1032 (2d Cir. 1985).

127. Esposito, *supra* note 102, at 319-25.

128. *Id. Contra In re Cummings*, 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982) (concluding that inmates involved in common law relationships can be denied conjugal visitation rights).

facilitate an escape plan.¹²⁹ Another concern which administrators raise is that denial of conjugal visitation rights may be improperly used as a threat by which prison officials can attempt to influence inmate behavior.¹³⁰

In addition, the problem of administrative inconvenience is implicated where prison administrators must provide visitation quarters, additional security personnel for transportation, and the administrative means to process inmates through the visitation program.¹³¹ These problems may militate against allowing conjugal visitation, although they have not posed tremendous obstacles for many of the institutions which currently allow the practice.¹³²

Given such concerns, conjugal visitation may not be the most viable procreative alternative for the majority of prisoners. The combination of security hazards and administrative problems would, in many cases, constitute a rational basis for denying conjugal visitation privileges.

By contrast, allowing procreation via artificial insemination or surrogate motherhood should pose little threat to institutional security and would amount to minor administrative inconvenience. Artificial insemination is no longer considered an experimental procedure.¹³³ A male prisoner could fulfill his role in the artificial insemination process by simply meeting with his doctor and providing the semen sample.¹³⁴ The doctor and the prisoner's spouse can then complete the procedure. The prison administration would, at most, have to allow the prisoner to meet for a brief period with his doctor. All costs of the procedure could be borne by the prisoner and his spouse.

129. *Id.* at 326-27.

130. *Id.* at 327.

131. *See id.* at 326-27.

132. *Id.* The privilege of conjugal visitation is distinguishable from the right to procreate, although some courts have recognized a constitutional right to visitation as a form of associational right arising under the first amendment; *see also* Hardwick, *supra* note 3, at 282. Others deny that there is any constitutionally-based visitation right. *Id.* at 281. *See, e.g.,* Evans v. Johnson, 808 F.2d 1427 (11th Cir. 1987).

133. Williams, *supra* note 82 at 464. "The process generally entails the introduction of male sperm into a female patient with a needleless hypodermic syringe . . . Fertilization occurs inside the mother's body and not in the laboratory." *Id.* at 464-65. Modern cryogenic capabilities also allow sperm to be taken from the donor and frozen for future use. *Id.* at 465.

134. *Id.* The Federal Bureau of Prisons delegates authority to the warden to approve furloughs. One permissible reason is to obtain necessary non-emergency medical treatment, which is not otherwise available, provided the chief medical officer makes a recommendation. If approved, the inmate bears any necessary expenses. 28 C.F.R. §§ 570.32 (a), (b) (1983), 570.41 (a) (2) (1985). Similar procedures could be established for facilitating the artificial insemination process, however, allowing the prisoner's doctor to visit the prison would be preferable in terms of security and administrative convenience.

While the artificial insemination procedure would pose virtually no practical problems for the prison administration with respect to the participation of a male prisoner, female prisoners cannot easily be accommodated with respect to in-prison pregnancies for several practical reasons. Pregnant prisoners require additional medical care, modified facilities, and special diets. All of these factors would prove taxing to the system, even if the prisoner were to pay for all medical costs. The combination of these factors would appear to constitute a rational basis for denying female prisoners the opportunity to attempt pregnancy.¹³⁵

However, the technique of surrogate motherhood presents a somewhat analogous situation to that of artificial insemination.¹³⁶ Surrogacy, like artificial insemination, creates negligible administrative inconvenience.

Even if it is conceded that prison officials should have a certain amount of discretion in granting or denying the exercise of marital and procreative rights to some classes of prisoners,¹³⁷ the majority of inmates should retain these rights, because they do not interfere with

135. This is not to say that the administration would therefore have the right to terminate a pregnancy which resulted from either unauthorized conduct or a conjugal visit. Although the conduct may have been unauthorized, once the pregnancy begins, officials cannot interfere with the mother's choice to abort or carry to term. *See, e.g., Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987) (county order requiring inmates to secure court-ordered releases to obtain abortions was unconstitutional, and to the extent the regulation required inmates to obtain their own financing for an abortion, the order impinged upon the right to choose an abortion and was unconstitutional). Nor does there appear to be an equal protection problem with respect to the male/female prisoner dichotomy, since men and women have been held not to be "similarly situated" with respect to pregnancy. *See, e.g., Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) ("[P]etitioner's policy of not awarding sick-leave pay to pregnant employees is legally indistinguishable from the disability-insurance program upheld in *Gilbert*."); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) ("Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis.") (quoting *Geduldig*, 417 U.S. at 496); *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (The Court held that exclusion of California's insurance coverage for the disability that accompanies pregnancy did not amount to invidious discrimination under equal protection.).

136. Williams, *supra* note 82, at 468. Several processes fall under the heading of surrogate motherhood. In one procedure, a woman has "ova removed from her body, fertilized *in vitro*, and then implanted into the womb of a surrogate mother who would carry the baby to term." *Id.* The second and more popular means of surrogate motherhood occurs when the surrogate mother conceives a child through artificial insemination with the sperm of a donor. *Id.*

This procedure occurs entirely without the physical participation of the donor's spouse, whose only part in the process is normally the subsequent adoption of the offspring. *Id.*

137. For example, prisoners on death row or prisoners serving life sentences who are "civilly dead". *See Ferrin v. State Dep't of Correctional Servs.*, 71 N.Y.2d 42, 517 N.E.2d 1370, 523 N.Y.S.2d 485 (1987) (denial of marital rights for prisoners serving life sentences); *see also*

safety, security, or prison administration. Due to the existence of new reproductive techniques, total denial of the right to procreate is certainly not a necessary incident of incarceration and, as a form of punishment, it is not one that suits most crimes.¹³⁸ Nor is denial a proper vehicle for promoting rehabilitation or deterrence of future crime.¹³⁹ In fact, allowing prisoners to exercise these rights could, arguably, further important rehabilitative goals.¹⁴⁰

In sum, there are certain legitimate goals which may be served by imposing limits on conjugal visitation. However, no goal would appear to be served by restriction of artificial insemination or surrogate motherhood. Therefore, even under the Supreme Court's reasonable relation standard, administrative regulations or unwritten policies which would totally preclude the use of artificial insemination and surrogate motherhood for all inmates should fail the test of constitutionality. Most prisoners should be able to avail themselves of these procreative options free of undue restriction.

CONCLUSION

Over the past few decades, the scientific techniques of artificial insemination and surrogate motherhood have opened up new avenues of opportunity for couples who have experienced childbearing difficulties.¹⁴¹ These procedures would permit a prisoner and his or her spouse to conceive children during the incarceration period without the need for intimate contact. Allowing prisoners to retain the right to engage in these procedures is not inconsistent with the goals of the penal system and imposes no substantial burden on the prison administration. In fact, the goal of rehabilitation may be furthered by allowing certain prisoners to have children, strengthening marital and familial bonds in the process.

Doe v. Coughlin, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (married prisoner denied conjugal visitation because he had AIDS).

138. See *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (Alexander, J. dissenting). Since these newly available techniques are relatively simple, there is no need for the administration to ban all types of reproductive activity. Instead, the prisoner should be free to pursue these alternatives, subject to reasonable regulation. Furthermore, the denial of procreative rights does not provide a suitable vehicle for punishment of most crimes, since such a denial has no discernible connection to furthering the goals of deterrence and rehabilitation, except presumably, in cases involving rape, child abuse, or other sex offenses. *But see Hendking v. Smith*, 781 F.2d 850 (11th Cir. 1986) (upholding an Alabama prison rule, excluding inmates with a history of violent sex offenses from furlough privileges, as not violative of equal protection).

139. See generally Hardwick, *supra* note 3.

140. See generally R. LEE, *supra* note 109, at 106-08.

141. See Williams, *supra* note 82, at 483.

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By recognizing that prisoners have the constitutional right to marry free of unreasonable restriction, the Supreme Court favorably enhanced the complement of rights which a prisoner retains during incarceration. Prisoners' procreative rights should ultimately receive similar recognition and protection.

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