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Constitutional Law—Prisoners' Rights—Prison Regulation Denying Inmate the Right to Artificially Inseminate Wife Held Constitutional. Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990).

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CONSTITUTIONAL LAW—PRISONERS' RIGHTS—PRISON REGULATION DENYING INMATE THE RIGHT TO ARTIFICIALLY INSEMINATE WIFE HELD CONSTITUTIONAL. *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

Steven Goodwin currently is serving a fourteen-year prison sentence for drug offenses[1] at the United States Medical Center for Federal Prisoners in Springfield, Missouri.[2] He will be eligible for parole in late 1991, and will be released no later than February 26, 1995.[3] Goodwin and his wife, who is not incarcerated, wish to have children.[4] Goodwin is concerned that his wife's age at the time of his scheduled release date will increase her chances of bearing a child with birth defects.[5] Therefore, he sought permission to artificially inseminate his wife.[6]

When Goodwin initially sought authorization and assistance from prison officials, the Bureau of Prisons (Bureau) refused to grant his request.[7] The Bureau denied the request because it had no program or policy which would govern such a procedure.[8] Goodwin appealed the Bureau's decision, but his subsequent requests were also denied.[9] Therefore, in August 1987 Goodwin filed a pro se petition for writ of habeas corpus[10] seeking a court order to compel prison authorities to allow him to artificially inseminate his wife and to provide certain necessary assistance in conjunction with the procedure.[11] Goodwin in-

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1. Note, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 TOURO L. REV. 189, 190 (1988).

2. Goodwin v. Turner, 908 F.2d 1395, 1396 (8th Cir. 1990). Goodwin is assigned to the Medical Center because of its proximity to his family and not for medical reasons. *Id.* at 1396 n.2.

3. 908 F.2d at 1396. Goodwin will be eligible for parole on September 2, 1991. *Id.* Prison officials noted there was "good reason to believe" that he would be granted parole during the early stages of his eligibility period. *Id.* at 1396-97.

4. *Id.* at 1396.

5. *Id.* at 1397. For example, based on his wife's age at the time of his latest possible release date, "[h]er risk of having a child born with Down's syndrome or a chromosomal abnormality will be 1 in 450 and 1 in 225, respectively." *Id.*

6. Goodwin v. Turner, 702 F. Supp. 1452, 1452 (W.D. Mo. 1988), *aff'd*, 908 F.2d 1395 (8th Cir. 1990).

7. 908 F.2d at 1397.

8. *Id.*

9. *Id.*

10. *Id.* The writ was filed pursuant to 28 U.S.C.§ 2241 (1988), governing the court's power to grant such writs.

11. 908 F.2d at 1397. Goodwin sought a court order that would force prison officials:

formed officials that he and his wife would bear the costs of the procedure.[12]

The magistrate granted Goodwin partial relief[13] and recommended that prison officials also grant his request.[14] The magistrate found that a prisoner's right to procreate survives incarceration.[15] Also, the magistrate noted that the prison's "blanket denial" of Goodwin's request, based on the absence of an applicable policy governing such a proposal, violated the minimum requisites of due process.[16] Thus, the magistrate recommended that Goodwin be allowed to "resubmit his request in detailed fashion" so that prison officials could specifically address his proposals.[17] Prior to Goodwin's filing a revised request, however, the Bureau adopted a policy outlining the rationale for its opposition to artificial insemination.[18] In this statement, the Bureau expressed its concern about the possible ramifications of allowing artificial insemination while imprisoned, particularly if such program would have to be made available to female prisoners who might bear children while in-

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(1) to grant him permission "to produce acceptable semen for impregnation of his wife"; (2) to allow several doctors . . . and at most, one medical assistant to enter the institution "for the purpose of properly collecting semen under safe and sanitary procedures and for freezing said semen in the proper manner"; (3) to give him tests to ensure he was free of sexually transmitted diseases . . .; and (4) to refrain from transferring him to any other institution until the dispute was fully resolved.

Id.

12. *Id.*

13. 702 F. Supp. at 1452.

14. 908 F.2d at 1397. "[T]he magistrate recommended that Goodwin submit his request in a clear and detailed fashion so that prison officials could either accommodate his request or make specific objections thereto." *Id.*

15. *Id.*

16. 702 F. Supp. at 1452.

17. *Id.*

18. 908 F.2d at 1397. The policy statement issued by the Bureau provides:

[S]ound correctional policy dictates against allowing inmates to artificially inseminate another person. . . .[I]f [artificial insemination were] allowed in one case, all of [the Bureau's] institutions 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. This situation would either require a significant drain on resources or create significant security risks, especially in connection with inmates with a high security classification. . . .The Bureau strives, to the extent possible, to treat all inmates equally. Therefore, in connection with indigent inmates, the Executive Staff felt that the Bureau would be in the position of having to either provide or pay for these services for these inmates and, with respect to female inmates, to significantly expand the medical services available.

Id. at 1397-98.

carcerated.[19] Furthermore, the Bureau addressed the costs of such a program as well as the various security problems which would arise.[20]

Because of the Bureau's announcement, Goodwin amended his petition before his case was reviewed by the district court.[21] He requested the Bureau's "assistance in providing him with a clean container in which to deposit his semen, and a means to swiftly transport the container outside the prison" for delivery to his wife.[22] Goodwin continued to maintain that he would bear the costs of the procedure.[23] The district court reviewed the record from the magistrate's ruling with "utmost scrutiny" and held that Goodwin did not have a fundamental right of procreation.[24] Specifically, the court held: "[R]egardless of the right petitioner has asserted, whether a right to privacy, a right to be free from cruel and unusual punishment, or a due process right, he does not have a fundamental constitutional right to father a child through artificial insemination that survives incarceration."[25]

Goodwin appealed the decision.[26] Although the Eighth Circuit Court of Appeals declined to decide whether prisoners have a fundamental right of procreation, it applied a test of lesser scrutiny and upheld the denial of Goodwin's request.[27] *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

The right of procreation is one based on the right to privacy.[28] The right to privacy is among several fundamental constitutional rights not explicitly mentioned in the Constitution.[29] It has been recognized as

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19. *Id.* at 1398.

20. *Id.*

21. *Id.* at 1398. The United States District Court for the Western District of Missouri reviewed Goodwin's petition in 1988. 702 F. Supp. at 1452.

22. 702 F. Supp. at 1453.

23. *Id.*

24. *Id.*

25. *Id.*

26. 908 F.2d at 1398.

27. *Id.* The court determined, "[T]he restriction imposed by the Bureau is reasonably related to achieving its legitimate penological interest." *Id.*

28. Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). For a good overview of the right of privacy, see Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

29. Certain "individaul rights which do not have a specific textual basis in the Constitution or its amendments [have been] deemed . . . to be 'fundamental'." J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 11.7 at 369 (3d ed. 1988). These have been placed into six categories: (1) freedom of association; (2) the right of suffrage and of participation in the electoral process; (3) the "right of personal mobility"; (4) the "right to fairness in the criminal process"; (5) the right of procedural due process; and (6) the right to privacy. *Id.* at 370-71.

"one aspect of the 'liberty' protected by the due process clause of the fourteenth amendment."[30] The privacy doctrine is only about twenty years old[31] and embodies a concept that certain personal decisions are private and should be free from governmental interference.[32] It has been extended to include private matters deemed "intimate or personal."[33] Procreation is a personal decision covered by the right to privacy.[34]

Ironically, one of the earliest Supreme Court decisions recognizing the importance of an individaul's right to procreate was a case involving a prison inmate. In *Skinner v. Oklahoma*[35] the United States Supreme Court struck down a statute enabling the state to initiate proceedings to seek sterilization of certain habitual offenders.[36] The petitioner in the case had been convicted twice for armed robbery.[37] After his second conviction, the Oklahoma Attorney General instituted proceedings to have him sterilized.[38] Despite legal challenges to the statute at the state level, the Oklahoma Supreme Court upheld the judgment directing that the petitioner be given a vasectomy.[39]

The United States Supreme Court held the statute unconstitutional on equal protection grounds and reversed the state court's decision.[40] Justice Douglas, writing for the majority, explained that marriage and procreation are "basic civil rights of man" and "are fundamental to the very existence and survival of the race."[41] Furthermore, since the liberty interests at stake are so vital, any government infringement thereon must be reviewed with strict scrutiny.[42]

A more recent Supreme Court case acknowledging the right of

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30. *Carey*, 431 U.S. at 684 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

31. Rubenfeld, *supra* note 28, at 740. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court announced: "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483.

32. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 465-66 (1987).

33. *Id.* at 466.

34. Nowak, *supra* note 29, at 371. "[T]his right to privacy has been held to include rights to freedom of choice in marital decisions, child bearing, and child rearing." *Id.*

35. 316 U.S. 535 (1942). Although the case was not decided under the privacy rubric, it nonetheless laid the foundation for the recognition of procreative rights.

36. *Id.* at 536-38.

37. *Id.* at 537.

38. *Id.*

39. 189 Okla. 235, 115 P.2d 123 (1941), *rev'd*, 316 U.S. 535 (1942).

40. 316 U.S. at 538-43.

41. *Id.* at 541.

42. *Id.*

procreation is *Carey v. Population Services International*.[43] In *Carey* a New York statute placing certain restrictions on the sale of contraceptives to minors was challenged.[44] The Court determined that the statute unconstitutionally violated the right of privacy under the due process clause.[45] The Court stated that "[t]he decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices [included in the right of personal privacy]."[46]

Since procreation is a fundamental right, any statute interfering with it would ordinarily be held to a high level of scrutiny.[47] However, prisoner status has evoked an analysis under a separate set of principles evolving from a line of Supreme Court cases involving prisoners' rights.[48]

Several early views developed concerning the status of persons incarcerated and the legal rights they retained. The first view, which surfaced in some early decisions, reflected an attitude that prisoners were slaves of the state and should be afforded no constitutional rights.[49] A second view emerged in *Price v. Johnston*[50] when the Supreme Court held that the rights of those imprisoned were necessarily curtailed because of the nature of confinement. The Court noted, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[51] A third and more expansive view was that a prisoner retained the same rights as an ordinary citizen except for those rights, which by necessary implication, must be taken from him by the law.[52] The Supreme Court has held that some constitutional rights survive incarceration.[53] The modern view of the status of prisoners' rights

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43. 431 U.S. 678 (1977).

44. *Id.* at 681.

45. *Id.* at 685.

46. *Id.*

47. *Id.* at 685-86. *See also* Nowak, *supra* note 29, at 370-71.

48. *See infra* note 102-106 and accompanying text.

49. Note, The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse? *Turner v. Safley*, 33 VILL. L. REV. 393, 399 (1988). For an excellent discussion of these historical views, see Cohen, *The Law of Prisoners' Rights: An Overview*, 24 CRIM. L. BULL. 321 (1988).

50. 334 U.S. 266 (1948).

51. *Id.* at 285.

52. Cohen, *supra* note 49, at 323 (citing Coffin v. Reichard, 148 F.2d 278 (6th Cir. 1945), *cert. denied*, 325 U.S. 887 (1945)). Cohen explains that "there is a 'rights are preferred' position inherent in this formulation." *Id.*

53. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners have right of protection against cruel and unusual purishment); Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoners have protections of the due process clause). *See also* Note, *Prisoners' Fourth Amendment Right to*

began to crystalize with a series of cases in the 1970s. The Supreme Court also embarked on a struggle to establish the proper standard of review for inmate claims of constitutional infringements.

One of the first of these cases was *Procunier v. Martinez*,[54] in which the Court appeared to bring an end to the federal courts' hands-off approach of dealing with prisoners' rights cases.[55] In *Martinez* inmates in the California Department of Corrections brought a class action challenging various regulations providing for the censorship of inmate mail[56] and restrictions on attorney-client interviews.[57] The Supreme Court affirmed the district court's decisions[58] and held the challenged regulations unconstitutional.[59]

Regarding prison authorities' practice of censoring prisoners' mail, the Court's first task was to develop the proper standard for reviewing such a claim.[60] Since the censorship of prisoners' correspondence also impinged first amendment rights of nonprisoners, the Court reasoned that the proper standard of review did not entail a determination of the

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Privacy: Expanding a Constricted View, 22 HOUS. L. REV. 1065 (1985).

> [I]t is fairly well accepted that prisoners retain fourteenth amendment due process protection, first amendment freedom of speech and religion, protection against racial discrimination, and eighth amendment protection against cruel and unusual punishment. The Supreme Court has both stated and maintained that no "iron curtain" separates prisons from the reach of the Constitution.

Id. at 1066.

54. 416 U.S. 396 (1974). Turner v. Safley, 482 U.S. 78 (1987), overruled much of the holding in *Martinez*. For a discussion of this, see *infra* note 142 and accompanying text.

55. 416 U.S. at 404. The Court acknowledged that federal courts traditionally employed a "broad hands-off attitude toward problems of prison administration." *Id.* Recognizing the need for deference to prison officials, the Court nonetheless explained that federal and state prison regulations which 'offend[s] a fundamental constitutional guarantee" should necessarily be reviewed by the courts. *Id.* at 405.

56. *Id.* at 399. Specifically, the censorship complaints arose from Director's Rule 1201 which provided: "Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence." *Id.* at 399 n.2. The phrases "unduly complain" and "magnify grievances" were applied to other rules regarding mail privileges. *Id.* Both incoming and outgoing mail were screened by censors. *Id.* at 400.

57. *Id.* at 419. The administrative rule governing this practice provided: "Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney." *Id.* at 419. This policy involved a ban on the use of paralegals and law students from conducting interviews with inmates. *Id.*

58. Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973). For subsequent history, see *supra* note 54.

59. 416 U.S. at 422.

60. *Id.* at 406-07.

legal status of prisoners.[61] Consequently, the Court announced a two-part test as the proper standard of review for prison mail censorship regulations.[62] Under the test, the regulation or practice had to promote "an important or substantial governmental interest unrelated to the supression of expression."[63] Secondly, the proposed limitation could be no greater than necessary to protect the particular interest involved.[64]

Applying this test, the Court held the challenged regulation unconstitutional.[65] The Court explained that the Department of Correction's practice of censoring statements that "unduly complain" or "magnify grievances" did not further any legitimate governmental interest.[66] Furthermore, in the event of a decision to censor particular correspondence, the Court agreed with the lower court's requirement that the affected inmate be accorded minimum procedural safequards.[67] The Court also affirmed the lower court's decision invalidating the regulation restricting prisoners' access to legal personnel.[68] The Court held the rule was "an unjustifiable restriction on the right of access to the courts."[69]

In the same year *Martinez* was decided, the Supreme Court handed down another important prisoners' rights decision. In *Pell v. Procunier*[70] a group of inmates at the San Quentin State Penitentiary[71] alleged that a California Department of Corrections regulation[72] restricting inmates' access to the press violated their first amendment

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61. *Id.* at 407-09. Instead, the Court looked to decisions "dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." *Id.* at 409. One of the Court's examples of how the regulation infringed upon the rights of nonprisoners is especially interesting: "The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409.

62. *Id.* at 413.

63. *Id.*

64. *Id.*

65. *Id.* at 415.

66. *Id.*

67. *Id.* at 417-18. These involved the notification of a prisoner upon the censorship of a letter written by or addressed to him and an opportunity for him to protest the decision. *Id.* at 418-19. Also, complaints were to be referred to a person other than the original prison official who had censored the letter. *Id.*

68. *Id.* at 419.

69. *Id.*

70. 417 U.S. 817 (1974).

71. *Id.* at 820 n.1.

72. Section 415.071 of the California Department of Corrections Manual prohibited media interviews with certain inmates. 417 U.S. at 819.

right to free speech.[73] The district court held the prohibition unconstitutional and granted summary judgment in favor of the inmates.[74]

Upon reviewing the regulation's impact on the inmates' constitutional rights, the Court held that a prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penoligical objectives of the corrections system."[75] Explaining that prisoners' first amendment rights must be analyzed in light of the policies and goals of the corrections system while allowing deference to prison officials, the Court found that reasonable alternatives existed whereby prisoners could have access to the outside world.[76]

The next important prisoners' rights case also involved a first amendment challenge. In 1977 in *Jones v. North Carolina Prisoners' Union*[77] inmates brought suit to enjoin the North Carolina Department of Corrections (NCDC) from frustrating their attempts to form and operate a prisoners' union.[78] Among other things, prison officials prevented bulk mailings by the union.[79] The inmates contended, and the lower court found, that NCDC's efforts to prevent the formation of a union violated the prisoners' first and fourteenth amendment rights of free speech, association, and equal protection.[80]

Writing for the majority, Justice Rehnquist restated the *Pell* char-

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73. *Id.* at 820. A group of journalists also alleged first amendment violations. The district court rejected their constitutional claim and the Supreme Court affirmed, holding that the "First Amendment [did] not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 833 (citing Branzburg v. Hayes, 408 U.S. 665, 684 (1972)). Since the Court found that the regulation did not affect the journalists' constitutional rights, it did not discuss what type of standard would have been appropriate for reviewing the rights of nonprisoner litigants in such a case. *Id.* at 833-34. This distinguished the case from *Martinez* where the Court reviewed the challenged regulation based on its incidental impact on nonprisoners.

74. *Id.* at 821.

75. *Id.* at 822.

76. *Id.* at 824. The Court noted that the prisoners could be visited by family members, friends, attorneys, and the clergy. Inmates could also have access to members of the press via mail. *Id.* at 824-25.

77. 433 U.S. 119, 121 (1977).

78. *Id.* at 121.

79. *Id.* at 130 n.7.

80. *Id.* at 121. The basis for the prisoners' equal protection claim was that the union had been denied certain privileges (i.e., the ability to hold meetings and to mail leaflets) that had been extended to other groups within the prison (i.e., Alcoholics Anonymous). *Id.* at 124. This argument failed chiefly because the Court determined that prisons were not public forums. Therefore, prison officials needed only to show "a rational basis for their distinctions between organizational groups." *Id.* at 134.

acterization of prisoners' first amendment rights.[81] Justice Rehnquist then emphasized the policy reasons for affording deference to prison officials' "expert judgment" in matters of prison administration.[82] The Court explained that lower courts should defer to the judgment of prison officials unless there is substantial evidence that the prison officials' response to particular prison needs has been exaggerated.[83]

In *Jones* the majority determined that the NCDC's restrictions were reasonable and "consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution."[84] Since the mail restriction involved only bulk mailing and the State had not otherwise hampered the prisoners' ability to communicate grievances, the Court stated that first amendment rights were "barely implicated" by the prisoners' complaint.[85] The prisoners' first amendment associational rights also had to yield to the interests of prison security.[86] Thus, *Jones* made clear that if inmates cannot demonstrate the unreasonableness of a challenged regulation, prison officials' burden in justifying it will be slight.[87]

In 1979 the Court faced the issue of rights of pretrial detainees. In *Bell v. Wolfish*[88] detainees[89] brought suit challenging confinement conditions and practices[90] at a federal custodial facility.[91] The Third Circuit Court of Appeals affirmed the district court's decision to enjoin a variety of the challenged practices at the facility.[92] The court of appeals reasoned that since pretrial detainees had not been convicted of

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81. *Id.* at 129.

82. *Id.* at 128 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). The Court noted, "Becuase the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators." *Id.* at 126.

83. *Id.* at 128 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

84. *Id.* at 130.

85. *Id.*

86. *Id.* at 132.

87. *Id.* at 127-28.

88. 441 U.S. 520 (1979).

89. The detainees were persons who were being held in custody for criminal charges prior to trial. *Id.* at 523.

90. The "veritable potpourri of complaints" included "overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books." *Id.* at 527.

91. *Id.* at 523. The respondents were being held at the Metropolitan Correctional Center in New York City which was primarily designed to house pretrial detainees. *Id.*

92. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'd*, 441 U.S. 520 (1979).

any crime, they should retain the same rights as unincarcerated individuals.[93]

The Supreme Court reached a different conclusion. Writing for the majority once again, Justice Rehnquist addressed the detainees' argument that the presumption of innocence[94] should protect them from the complained of conditions at the facility.[95] The Court determined that although the presumption of innocence provided numerous protections for persons accused of crimes,[96] it was not applicable to detainees' rights regarding the conditions of their confinement.[97] Similarly, "the detainee's desire to be free from discomfort" was not a fundamental liberty interest.[98]

Thus, the majority determined that the proper inquiry was whether the challenged conditions constituted punishment.[99] Emphasizing the policy of deferring to prison officials, the Court proceeded to systematically address the specific complaints of the detainees.[100] Since the conditions did not constitute punishment, the Court held that the prison's practices which had given rise to the conditions were reasonable responses founded on legitimate security concerns.[101]

In 1987 the Supreme Court announced the foremost decision in the area of prisoners' rights. In *Turner v. Safley*[102] the Court definitively established the standard for reviewing prison regulations that impinge on a prisoner's fundamental constitutional right.[103] In *Turner* inmates at Renz Correctional Institution of the Missouri Department of Corrections (Renz) brought a class action seeking injunctive relief and

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93. 573 F.2d at 124.

94. Since the detainees had not been tried and convicted, they necessarily possessed a presumption of innocence regarding the crimes for which they had been charged. 441 U.S. at 532. "Both the Court of Appeals and the District Court . . . relied on the 'presumption of innocence' as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity." *Id.*

95. *Id.* at 533.

96. These include the allocation of the burden of proof and a charge to the jury to rely only upon the evidence produced at trial. *Id.* at 533.

97. *Id.*

98. *Id.* at 534.

99. *Id.* at 535.

100. *Id.* at 537-61

101. *Id.* at 561.

102. 482 U.S. 78 (1987).

103. *See* Gerhardstein, *False Teeth? Thornburgh's Claim that Turner's Standard for Determining a Prisoner's First Amendment Rights is not "Toothless"*, 17 N. KY. L. REV. 527, 530-33 (1990).

damages arising from two prison regulations.[104] The Renz facility houses both male and female offenders,[105] and the first of the challenged regulations was a rule limiting correspondence between inmates.[106] The second regulation placed restrictions on inmates' ability to marry.[107]

The Supreme Court accepted the case with the task of redefining the proper standard of review for prisoners' rights claims.[108] Following the trend of the earlier prisoners' rights cases, the Court explained the importance of giving great deference to prison officials.[109] The Court then announced the current standard for reviewing prison regulations allegedly violating inmates' rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[110]

The Court applied several factors from the earlier cases which it deemed relevant in determining whether prison regulations were reasonable.[111] First, a "valid, rational connection" must exist between the regulation and the legitimate interest put forward to justify it.[112] Thus, if the connection is arbitrary or irrational, the regulation will be deemed invalid.[113] The second factor to be considered is whether alter-

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104. 482 U.S. at 81.

105. *Id.*

106. *Id.* at 81-82. Specifically, the regulation permitted correspondence dealing with legal matters or between "immediate family members" who were incarcerated. *Id.* at 81. Other correspondence between inmates had to be approved by certain prison officials. *Id.* at 81-82. "At Renz, the District Court found that the rule 'as practiced is that inmates may not write non-family inmates'." *Id.* (quoting Safley v. Turner, 586 F. Supp. 589, 591 (W.D. Mo. 1984)).

107. *Id.* at 82. This regulation was introduced after the original litigation between the parties. *Id.* Under the marriage regulation, prisoners could marry only if granted permission by the prison superintendent. *Id.* The regulation further advised that such permission would not be given unless there was a compelling reason for the marriage. *Id.* "Compelling" was indicated to mean that only "a pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.*

In addition to those incarcerated at Renz, those included in the class for litigation were persons who wished to marry inmates in the Missouri prison system and whose rights to marry "have been or will be violated." *Id.* It also included those persons who wished to correspond with inmates. *Id.* The district court declared both regulations to be unconstitutional. 586 F. Supp. at 594-96. The Eighth Circuit Court of Appeals held that the district court properly applied a strict scrutiny standard of review. Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985). Both courts cited *Martinez* as authority for reviewing the regulations with strict scrutiny. *Id.* at 1313.

108. 482 U.S. at 85.

109. *Id.* at 89.

110. *Id.*

111. *Id.*

112. *Id.* (citing Block v. Rutherford, 468 U.S. 576, 586 (1984)).

113. *Id.* at 89-90.

native avenues exist whereby the prisoner can still exercise the right at issue.[114] Third, the court should consider the extent the accommodation of the right would affect other inmates and prison resources.[115] The fourth and final consideration is that "the absence of ready alternatives is evidence of the reasonableness of [the] regulation."[116] The Court cautioned that the last factor should not be construed as a least restrictive alternative test.[117] Instead, it explained that if an inmate pointed to a feasible alternative which could accommodate his right at a "de minimis cost to valid penoligical interests," it would be evidence of the regulation's invalidity.[118]

Applying the four factors of the reasonable basis test to the challenged regulations, the Court held the inmate correspondence restriction constitutional.[119] However, the Court struck down the marriage regulation, holding marriage to be a constitutional right that survives incarceration.[120] Although the Court noted that prison officials are free to place reasonable restrictions on a prison's right to marry,[121] ready alternatives existed that would have been de minimis to prison concerns. Thus, the Court held the challenged regulation to be "an exaggerated response."[122]

Since the marriage regulation did not pass muster under the reasonable basis test, the Court did not decide whether the heightened

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114. *Id.* at 90.

115. *Id.*

116. *Id.* (citing Block v. Rutherford, 468 U.S. 576, 587 (1984)).

117. *Id.*

118. *Id.* at 91.

119. *Id.* at 91-93.

120. *Id.* at 96. Noting that marriage is a fundamental right under Zablocki v. Redhail, 434 U.S. 374 (1978), and Loving v. Virginia, 388 U.S. 1 (1967), the Court held that certain incidents of marriage are unaffected by confinement and are "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.*

121. *Id.* at 95-97.

122. *Id.* at 97-98. The Bureau was concerned that inmate marriages might lead to love triangles that would cause security problems and violence among jealous inmates. *Id.* at 97. The Court determined that the marriage regulation constituted an exaggerated response to those security concerns. *Id.* at 97-98. The Court cited a regulation governing inmate marriages at federal prisons as an example of a ready alternative. *Id.* at 98. Instead of a blanket prohibition of inmate marriages, 28 C.F.R. § 551.10 (1986), permits inmate marriages unless the warden determines that the marriage would threaten the security or order of the institution. 482 U.S. at 98. The Court also distinguished an earlier decision which summarily affirmed a prohibition on prisoners' right to marry because that particular restriction applied only to inmates with life sentences. *Id.* at 96. (citing Butler v. Wilson, 415 U.S. 953 (1974), *summarily aff'g* Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973) (the prohibition of marriage was held to constitute part of the punishment of the crime)).

Martinez standard should be applied to determine the rights of unincarcerated persons who wished to marry prisoners.[123] It suggested, however, that the stricter test might be employed when a prison regulation impinges upon rights of nonprisoners.[124]

Eight days after *Turner* was decided, the Court handed down another decision in which it applied the reasonable basis test to a prison regulation. In *O'Lone v. Estate of Shabazz*[125] the Court reversed the Third Circuit by upholding a prison regulation impairing Islamic inmates' ability to attend certain religious services.[126] The prisoners claimed that this restriction violated their first amendment right to the free exercise of religion.[127] They also contended that the prison policy should be reviewed with heightened scrutiny because it prohibited, instead of merely limited, a constitutional right.[128]

The Court responded that the *Turner* standard of review was appropriate despite the regulation's prohibition of a constitutional right.[129] After applying the reasonable basis test and the factors set out in *Turner*, the Court upheld the policy.[130] Furthermore, the majority criticized the court of appeals for placing a burden on prison officials to prove that there was no alternative methods for accommodating the prisoners' asserted rights.[131] The Court explained, "[B]y placing the burden on prison officials to disprove the availability of alternatives, the approach . . . fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."[132] The rulings in *Turner* and *O'Lone* conclusively established the reasonable basis test as the proper standard of review for prison regulations that purportedly infringe on prisoners' constitutional rights.

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123. *Id.* at 97. *See supra* note 107.

124. *Id.* Indeed, dicta in the opinion indicated that such a standard might well be appropriate in such a case. *Id.* Although it was not raised by the inmates, the Court explained, "[T]his implication of the interests of nonprisoners may support application of the *Martinez* standard, because the regulation may entail a 'consequential restriction on the [constitutional] rights of those who are not prisoners.' " *Id.*

125. 482 U.S. 342 (1987).

126. *Id.* at 345. Specifically, prison rules requiring outside work details for several prisoners precluded Islamic inmates the opportunity to attend Jumu'ah, a Muslim religious service that is traditionally held on Fridays. *Id.*

127. *Id.*

128. *Id.* at 349 n.2.

129. *Id.*

130. *Id.* at 353.

131. *Id.* at 350 (citing Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir. 1986), *rev'd*, 482 U.S. 342 (1987)).

132. *Id.* at 350.

In two of its most recent prisoners' rights cases, the Supreme Court has applied the *Turner* reasonable basis test. In Thornburgh v. Abbott[133] the Court upheld a Federal Bureau of Prisons regulation permitting wardens to restrict an inmate's right to receive certain publications.[134] The Court's analysis began with a determination that the reasonable basis test was the proper standard of review for the challenged regulation.[135] Upon reaching that decision, the Court laid to rest any notions that the *Martinez* standard, which was less deferential to prison authorities, was the proper standard of review for regulations that restrict incoming correspondence from nonprisoners.[136] Instead of the *Martinez* standard, the Court applied the reasonableness test which it determined was not "toothless."[137] Having established the appropriate standard of review, the Court applied the *Turner* factors and found the regulation to be "facially valid."[138] It then remanded the case for an examination of the specific publications issue.[139]

One year later in *Washington v. Harper*[140] the Court reversed a Washington Supreme Court decision involving the administration of antipsychotic drugs to an inmate without his consent. Because of the "highly intrusive nature" of the drug treatment, the Washington court determined that the inmate's liberty interest in refusing treatment was such that he should be afforded great procedural protections.[141]

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133. 490 U.S. 401 (1989).

134. *Id.* at 419. The regulations at issue, 28 C.F.R. § § 540.70 and 540.71 (1988), allow the warden to reject publications that are determined to be "detrimental to the security, good order, discipline of the institution or if it might facilitate criminal activity." 490 U.S. at 404. "The regulations provide[d] procedural safeguards for both the recipient and the sender." *Id.*

135. *Id.* at 414.

136. *Id.* at 413. The Court noted:

> The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in *Turner*) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it. To the extent that *Martinez* itself suggests such a distinction, we today overrule that case; the Court accomplished much of this step when it decided *Turner*.

Id. at 413-14.

137. *Id.* at 414 (citation omitted). *See also* Gerhardstein, *supra* note 103.

138. 490 U.S. at 419.

139. *Id.*

140. 110 S. Ct. 1028 (1990).

141. *Id.* at 1034 (quoting Harper v. Washington, 110 Wash. 2d 873, 880-81, 759 P.2d 358, 363 (1988), *rev'd*, 110 S. Ct. 1028 (1990)). Analyzing the case on due process grounds, the Washington court held that prison officials could not force the inmate to undergo treatment without affording him "the full panoply of adversarial procedural protections. . . ." *Id.* at 1035 (quot-

The Supreme Court held that the state court erred in not applying the reasonable basis standard of review.[142] Relying on *Turner*, the Court explained that the reasonableness test is proper for reviewing prison regulations that infringe on the constitutional rights of prisoners.[143] The Court also noted that the lesser standard of review announced in *Turner* is applicable even when the regulation infringes upon a fundamental right that would otherwise warrant a more heightened level of scrutiny.[144] Applying the factors set out in *Turner*, the Court held that administration of antipsychotic drugs to an inmate without his consent is constitutional.[145]

Following Supreme Court precedent, the Third Circuit in *Monmouth County Correctional Institutional Inmates v. Lanzaro*[146] applied the *Turner* test to a prison regulation requiring county inmates to obtain court-ordered releases and independent financing[147] before they could receive an abortion.[148] In *Lanzaro* the court first examined the right to an abortion and concluded that a woman's right to elect an abortion is "fundamental."[149] It then determined that the challenged regulation did not pass muster under the reasonable basis test.[150] The court reasoned that an inmate's election to terminate her pregnancy would not entail any additional drain on prison resources since special accommodations would have to be made anyway for her to carry the

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ing Harper v. Washington, 110 Wash.2d 873, 883-84, 759 P.2d 358, 364-65 (1988), *rev'd*, 110 S. Ct. 1028 (1990)). Moreover, the Court held that the State had a burden to prove by "clear, cogent, and convincing" evidence that the administration of the medication was a necessary and effective means for satisfying a compelling state interest. *Id.*

142. *Id.* at 1037.

143. *Id.*

144. *Id.* (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).

145. *Id.* at 1044.

146. 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

147. Essentially, county funds would finance inmate abortions only in life threatening situations. 834 F.2d at 328.

148. 834 F.2d at 327-28. For an excellent discussion of this case and the legal status of inmate abortions, see Norz, *Prenatal and Postnatal Rights of Incarcerated Mothers*, 20, COLUM. HUM. RTS. L. REV. S-55 (1989). *See also* Comment, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U.L. REV. 455 (1986); and Note, *Inmate Abortions - The Right to Government Funding Behind the Prison Gates*, 48 FORDHAM L. REV. 550 (1980). Federal regulations providing guidelines for inmate abortions can be found at 28 C.F.R. § 551.23 (1990).

149. 834 F.2d at 334. *See also* Roe v. Wade, 410 U.S. 113, 153 (1973).

150. 834 F.2d at 351. The court concluded that "the court-ordered release requirement (1) bears no logical connection to any legitimate penological interest; (2) deprives inmates electing to terminate their pregnancies an alternative means of exercising their right; and (3) constitutes an exaggerated response to the County's asserted financial and adminsitrative concerns." *Id.*

child to term.[151]

The court then held that the court-ordered release requirement bore no "logical connection to any legitimate penoligical interest. . . ."[152] Also, the court determined that the county had to assume the expenses for an inmate choosing an elective, nontherapeutic abortion.[153]

In the wake of this extensive line of prisoners' rights cases, the Eighth Circuit decided *Goodwin v. Turner* and upheld a prison regulation prohibiting a prisoner from artificially inseminating his wife.[154] The court first acknowledged the right of procreation and assumed, without deciding, that it survived incarceration.[155] The court then addressed Goodwin's argument that denial of the right to artificially inseminate his wife had a "direct impact" on her right to procreate, and that a strict level of scrutiny was therefore appropriate.[156] The court based its rejection of this argument on a comparison of the right to procreate and the freedom of association.[157] The court noted that a necessary consequence of incarceration is the denial of an inmate's freedom to be with family and friends.[158] Therefore, regulations limiting visitation are not subject to strict scrutiny even if they infringe on the associational rights of a prisoner's spouse.[159] Such regulations, the court reasoned, are upheld whenever they are reasonably related to legitimate prison objectives.[160] Therefore, by analogy, strict scrutiny is not necessary when other prison regulations have an incidental adverse effect on the fundamental rights of a prisoner's spouse.[161] The court added that in the prison context even fundamental rights are subject to

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151. *Id.* at 341-42

152. *Id.* at 351.

153. *Id.*

154. 908 F.2d 1395 (8th Cir. 1990) (Judge Magill wrote the opinion for the three-judge tribunal).

155. *Id.* at 1398. Since the lesser scrutiny of the reasonable basis test could be applied to uphold the Bureau's refusal of Goodwin's request, the court saw no need to determine whether procreation was a fundamental right surviving incarceration. *Id.* The court noted, "Even assuming, without deciding, that the exercise of Goodwin's right to procreate is not fundamentally inconsistent with his status as a prisoner, the restriction imposed by the Bureau is reasonably related to achieving its legitimate penological interest." *Id.*

156. *Id.* at 1399.

157. *Id.*

158. *Id.* (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).

159. *Id.*

160. *Id.*

161. *Id.*

the reasonableness standard.[162]

In determining whether the prison regulation was constitutional, the court relied upon the four factors set forth in the *Turner* test.[163] First, the court held that there was a valid connection between the regulation and the Bureau's stated interest.[164] The overriding legitimate penoligical interest in the court's estimation was the Bureau's interest in treating male and female prisoners equally.[165] The court accepted the Bureau's assertion that, if ordered to allow males to procreate, it would have to make available a similar program for female inmates.[166] Such a consequence, predicted the court, "would have a significant impact on the allocation of prison resources generally . . . ."[167]

Goodwin conceded that procreation would be a complicated burden with respect to female inmates.[168] However, he countered that the issue of whether a female's right to conceive survives incarceration should be decided in an actual case involving such facts.[169] This argument did not persuade the majority. Because the Bureau had an express policy of treating both sexes the same, forcing it to allow males to procreate, would also force it to allow females the same privilege or compromise an established prison policy.[170]

Applying the second *Turner* factor, the court found that no reasonable alternatives existed whereby Goodwin's request could be granted.[171] The court determined that this was evidence of the reasonableness of the challenged policy.[172] Since no ready alternative was found, the court did not apply the final factor from *Turner* dealing with less restrictive alternatives.[173]

Then the court applied the third factor involving the impact the

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162. *Id.* at 1398-99.

163. *Id.* at 1399-1400.

164. *Id.* at 1399.

165. *Id.* The court explained that the Bureau's other concerns (i.e., potential tort liability) were not "legitimate *penological* interests. . . . " *Id.* at 1399 n.7 (emphasis in original).

166. *Id.* at 1400.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* Although the court did not make reference to a specific regulation in this regard, it simply noted that the objective of equal treatment of male and female prisoners was "*established prison policy.*" *Id.* (emphasis in original). Thus, the potential for expanded medical programs for females was a relevant penological concern in the estimation of the majority. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

accommodation of the right would have on prison resources.[174] Again, the court resorted to the argument that the right of procreation would significantly impact prison resources if it were expanded to apply to female inmates.[175] Allowing a male prisoner to procreate would lead to the kind of "ripple effect" referred to in *Turner*.[176] Therefore, discretion of prison officials was a primary concern.[177] Because the prison policy satisfied the *Turner* factors, the court determined that the prison regulation prohibiting artificial insemination satisfied the reasonableness test.[178]

In his dissent, Judge McMillian argued in favor of reversing the lower court's decision.[179] Before applying the reasonableness test, the dissent addressed the right of procreation to determine whether it was one which should survive incarceration.[180] Relying on *Skinner* and *Lanzaro*, the dissenting judge determined that Goodwin had indeed asserted a fundamental right which should survive incarceration.

First, Judge McMillian disagreed with the majority's acceptance of the equal treatment objective asserted by the Bureau.[181] The Bureau's interest in equal treatment of prisoners "is, at best, only tangentially present here," stated Judge McMillian.[182] The fact that the right could be legitimately denied to female prisoners, he reasoned, did not bear a rational relationship to the Bureau's asserted interest of equal treatment.[183] Judge McMillian criticized the majority for considering a hypothetical case in support of its holding that the granting of Goodwin's request would have a "significant impact" on prison resources.[184] He countered that such hypothetical situations should not be given "significant weight."[185] Furthermore, the dissent contended that a court could apply the *Turner* test to a female prisoner and justify a different result.[186] In summation, Judge McMillian wrote that the court should have held the Bureau's "exaggerated response" to Goodwin's "narrowly

174. *Id.*
175. *Id.*
176. *Id.* (citing Turner v. Safley, 482 U.S. 78, 90 (1987)).
177. *Id.*
178. *Id.*
179. *Id.* at 1401 (McMillian, J., dissenting).
180. *Id.*
181. *Id.* at 1404-05.
182. *Id.* at 1405.
183. *Id.*
184. *Id.* at 1406.
185. *Id.*
186. *Id.*

tailored request" for the exercise of his constitutional right unconstitutional.[187]

In recognition of this trend in prisoners' rights cases, the Eighth Circuit, which had applied an improper standard in *Turner v. Safley*,[188] did not want to make the same mistake again. Thus, when confronted with Goodwin's request to artificially inseminate his wife, the Eighth Circuit reviewed the Bureau's denial of that right under the reasonable basis test.[189] Consequently, the majority mechanically applied the four-part test from the Supreme Court's decision in *Turner v. Safley* and accorded deference to the judgment of prison administrators.

The majority also declined to resolve the issue of whether procreation is a fundamental right surviving incarceration.[190] The dissent took the opposite view.[191] Determining that procreation is a fundamental right surviving incarceration, Judge McMillian concluded that the reasonable basis test, as applied to Goodwin's specific request, afforded an accommodation of that right.[192] Criticizing the majority for resorting to hypothetical situations, Judge McMillian's analysis focused on Goodwin's specific request. As a result, his dissent was well-reasoned and provided a more comprehensive examination of the actual case before the court.

Based on the tenor of recent Supreme Court decisions in this area, the result reached by the Eighth Circuit would likely be affirmed if the Supreme Court granted certiorari. The dissent's arguments, although well-reasoned and logical, would probably not pass muster under the Supreme Court's application of the reasonable basis test which strongly favors the discretion of prison officials.

The ultimate result in this case of first impression clearly reveals

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187. *Id.* Judge McMillian argued that such an event would not be a proper justification for the denial of Goodwin's request in this case. *Id.*

188. *See supra* notes 110-18 and accompanying text.

189. 908 F.2d at 1407. Judge McMillian also pointed out that Goodwin's request could be granted at a "negligible" cost to prison resources. *Id.* at 1406. This was because Goodwin sought only a clean container and had repeatedly offered to pay any related expenses. *Id.* at 1407.

190. *See supra* notes 115-22 and accompanying text.

191. See *supra* note 155. For an excellent argument supporting the notion that procreation survives incarceration, see Note, *supra* note 1.

192. 908 F.2d at 1402. Although conceding that procreative rights can be substantially restricted during incarceration, Judge McMillian nonetheless noted, "I think there is little question that the procreative right survives incarceration." *Id.* Noting that *Skinner* placed marriage and procreation on an equal plane, Judge McMillian read the Supreme Court's decision in *Turner v. Safley*, which held that marriage rights survive incarceration, as supporting the contention that procreation should be afforded similar protection. *Id.*

the obstacles cluttering the path of the incarcerated who wish to assert violations of constitutionally protected rights. The *Goodwin* decision demonstrates that prison regulations have become increasingly difficult to effectively challenge. This is true even in cases such as this where a prisoner's otherwise fundamental constitutional right has been implicated.

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