LOCKING UP THE RIGHT TO PROCREATE

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ABSTRACT

There is no question that Dobbs v. Jackson Women's Health Organization *impacted more than just abortion rights—from access to assisted reproductive technologies (ARTs), contraception, marriage rights, family privacy, and parental rights—*Dobbs *has unsettled the constitutional ground these rights rest on. One contributing factor is that abortion rights have been bundled up with other reproductive, family, sexual, and privacy rights over the years, allowing* Dobbs *to shake the grounds of a wide range of constitutional protections. This Article sets out to unbundle one of those rights: the right to procreate.*

In analyzing the history and judicial development of the right to procreate, this constitutional right was identified before other family and privacy rights, avoiding initial tangling with these other rights. However, shortly after being identified, constitutional rights and protections in other areas (abortion, contraception, family rights, etc.) started to emerge, providing alternative grounds to argue for reproductive rights. Further, most forced-sterilization programs had been rebranded by the government to avoid legal challenges under the right to procreate. These factors left us with few cases where the right to procreate had truly been defined and refined. That is, outside of prisons.

While constitutional rights are not terminated at the prison doors, the government can more easily restrict constitutional rights in prisons. First, a right is only protected in prisons if it is not inconsistent with the goals of incarceration. Second, a right that survives incarceration can be limited based on an analysis of the Turner *factors: the relationship between the restriction and a valid governmental interest; whether there are alternative means of exercising the right; the impact of accommodating the right; and whether there are ready alternatives to affording the right. Initially, the right to procreate was determined to be inherently at odds with incarceration because procreation necessarily involved sexual reproduction, which opposed a prison's goals of punishment and seclusion while posing security*

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and safety risks. Yet, when ARTs became available, courts did not extend the right to procreate to include utilizing ARTs while incarcerated. These decisions were based on a misguided understanding of both the right to procreate and modern medical knowledge related to reproduction. When applying the right to procreate under the limited case law we have, and through the guidance of current medical knowledge, we get a different result: one that protects the right to procreate in prisons and to use ARTs.

*Looking at the right to procreate in prisons is not just important for incarcerated individuals. When a constitutional right is available for those in prison, it is also available broadly. This is particularly important for finding that the right to procreate can be interpreted separately from other reproductive and family rights, and for finding that the right to procreate protects access to ARTs. Two metaphors for the post-*Dobbs *environment help us understand why "unbundling" the right to procreate from other fundamental rights is important: one metaphor looks at* Dobbs *like a window into a home built from the bundle of rights, and another looks at* Dobbs *as if it pulled a foundational Jenga block out of the tower that many freedoms sat upon. Under either of these, being able to recognize the right to procreate as an independent right serves to create a means for constitutional arguments for protection. Returning to the metaphors, the right to procreate serves as a wall that limits the government's ability to look through the window into the house of reproductive rights, or as an independent Jenga block to rest the argument for rights on. By identifying the right to procreate—and specifically the right to procreate using ARTs—within prisons, the right to procreate may serve as a vehicle for protecting ART access and other methods of reproduction.*

INTRODUCTION

In recent U.S. history, reproductive rights have been at the forefront of political and social battlegrounds in congressional chambers and courtrooms across the country.[1] In 2023, reproductive rights took a major hit; the constitutional right to abortion was reversed in the Supreme Court case, *Dobbs v. Jackson Women's Health Organization*.[2] Soon after this loss at the federal level, the fight over abortion took off with battles across state governments.[3] As a tactic to restrict abortion access, a number of states have enacted *fetal personhood laws*, which extend the legal recognitions and protections of legal personhood to a fetus or, in some cases, even an embryo outside the human body.[4] However, fetal personhood laws are a threat to reproductive rights beyond just abortion rights. In states such as Alabama, fetal personhood laws have turned into ammunition,[5] shooting holes in legal access to *in vitro fertilization* (IVF)[6] and other types of *assisted reproductive technologies* (ARTs).[7] Whether or not intentional, these laws have created

1. Although *Roe v. Wade* is often regarded as the start of politicization of the reproductive rights movement, it certainly was not the first major legal battle or social push for reproductive rights. 410 U.S. 113 (1973). For example, Congress passed the Comstock Act in 1873 to prohibit the mailing of "obscene matter," including information about birth control. 18 U.S.C. § 1461. Similarly, in *Buck v. Bell*, the Court upheld state sterilization programs that forcibly sterilized certain people to prevent them from having children. 274 U.S. 200, 207 (1927). Additionally, until *Levy v. Louisiana*, states commonly used illegitimacy laws to deter having children outside of marriage by creating substantial legal burdens on non-marital children. 391 U.S. 68, 71–72 (1968); *see* Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 WASH. U. L. REV. 2063, 2070 (2022) ("[T]he increasing incidence of nonmarital births dovetails with the law's liberalization of the legal impediments that traditionally have been associated with illegitimacy.").

2. 597 U.S. 215, 263–92 (2022).

3. *See, e.g.*, Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER (June 16, 2023), https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe (summarizing state legislative actions related to reproductive health after *Dobbs* shifted the fight to states).

4. Adam Edelman, *An Uptick in State Personhood Bills Fuels Growing Fears Over IVF Restrictions*, NBC NEWS (Feb. 23, 2024), https://www.nbcnews.com/politics/personhood-bills-ivf-restrictions-alabama-rcna140228 (explaining current state bills "which aim to establish that an embryo or fetus should have the full rights of a person based on the idea that life begins at conception").

5. LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 695–97 (Ala. 2024).

6. IVF is a reproductive technique where an egg is fertilized outside a person's body and, after fertilization, implanted into their uterus. *See generally In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716; Aria Bendix, *Pauses on Embryo Transfers Out of Alabama Leave IVF Patients with Few Options*, NBC NEWS (Feb. 23, 2024), https://www.nbcnews.com/health/health-news/pauses-embryo-transfers-alabama-leave-ivf-patients-options-rcna140052.

7. Kim Bellware & Maham Javaid, *Third Ala. IVF Clinic Halts Operation After State High Court Ruling*, WASH. POST (Feb. 22, 2024), https://www.washingtonpost.com/nation/2024/02/22/third-alabama-ivf-clinic-pauses-treatment/. There are a range of definitions of ART, however, ART generally refer to any reproductive procedure that handles eggs or sperm outside of the human body. *See Assisted Reproductive Technology: Definition*, YALE MEDICINE, https://www.yalemedicine.org/clinical-

new obstacles—and for some people, effective prohibitions—on the right to procreate.

The right to procreate was recognized by the Supreme Court as a fundamental right in 1942.[8] Despite referencing the right to procreate in many cases, the Court has not further defined this right since initially recognizing it—even in lower courts, it is rarely addressed.[9] One reason the right to procreate has been largely ignored is that the abortion[10] and

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keywords/assisted-reproductive-technology (last visited Dec. 14, 2025) ("Assisted reproductive technology (ART) refers to a group of medical procedures and treatments designed to help individuals who are experiencing fertility issues or have difficulty conceiving naturally. These techniques involve the manipulation of eggs, sperm, or embryos in a laboratory setting to increase the chances of successful conception and pregnancy."); *NCI Dictionary of Reproductive Terms: Assisted Reproductive Technology*, NAT'L CANCER INST., https://www.cancer.gov/publications/dictionaries/genetics-dictionary/def/assisted-reproductive-technology (last visited Dec. 14, 2025) ("Procedures that use donor or nondonor eggs and sperm to create embryos in vitro. Examples of assisted reproductive technology include in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT). These procedures may be used prior to preimplantation genetic testing (PGT). Also called ART."); *Assisted Reproductive Technology*, AM. MED. ASS'N CODE OF ETHICS, https://code-medical-ethics.ama-assn.org/ethics-opinions/assisted-reproductive-technology (last visited Dec. 14, 2025) ("'Assisted reproductive technology' is understood as all treatments or procedures that include the handling of human oocytes or embryos. It encompasses an increasingly complex range of interventions—such as therapeutic donor insemination, ovarian stimulation, ova and sperm retrieval, in vitro fertilization, gamete intrafallopian transfer—and may involve multiple participants."). For purposes of this article, ART refers to any method of reproduction that goes beyond traditional sexual reproduction, including techniques that are a part of larger reproductive methods. This can include medical and laboratory procedures such as egg retrieval, IVF, intrauterine insemination (often referred to as "IUI"), intracytoplasmic sperm injection (often referred to as "ICSI"), sperm washing, embryo incubation, preimplantation genetic testing (often referred to as "PGT"), embryo transfers, and cryopreservation of embryos and genetic materials. However, this definition also includes reproductive techniques that can be done outside of a medical setting such as artificial insemination, sperm donation, and "traditional" surrogacy in which the surrogate's genetic material is used rather than a donor egg or embryo.

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

9. *See infra* Part I.

10. The *abortion cases* are the set of cases that explained the right to abortion between 1973 and 2022—between the establishment of this right in *Roe* and the reversal in *Dobbs*. The set of cases evolved over the period, with some cases overturning and refining the decisions in previous ones. These cases includes: Roe v. Wade, 410 U.S. 113, 162–64 (1973) (deciding that a state's interest in protecting potential fetal life cannot overrule the privacy and personal autonomy a person has for ending a pregnancy); Bellotti v. Baird, 443 U.S. 622, 647–48 (1979) (prohibiting states from requiring parental consent for a minor to receive an abortion without having an additional alternative for approval); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 431–52 (1983) (striking down multiple restrictions on abortion access); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764 (1986) (finding that a state could not require a doctor to provide information about fetal development and abortion alternatives); Hodgson v. Minnesota, 497 U.S. 417, 450–55 (1990) (ruling against strict parental consent notification policies); Planned Parenthood v. Casey, 505 U.S. 833, 874–79 (1992) (replacing the "trimester" test with the "undue burden" test for determining abortion rights); Stenberg v. Carhart, 530 U.S. 914, 929–46 (2000) (striking down a state's "partial birth abortion" ban); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 325 (2006) (requiring abortion restrictions to include protections for the health of pregnant people); Gonzales v. Carhart, 550 U.S. 124, 146–68 (2007) (allowing states to enact "partial birth abortion" bans out of interest in protecting potential life); Whole Woman's Health v. Hellerstedt,

reproductive privacy cases[11] entered the judicial scene shortly after the right to procreate was recognized. These cases provided more explicit protections that could be used to argue for greater access to reproductive choices, such as ARTs and reproduction outside of traditional family structures.[12] Another factor contributing to the judicial neglect of the right to procreate is due to the government reshaping forced-sterilization programs into voluntary ones,[13] eliminating the direct attack on the right to procreate. As a result, of the few cases that center on the right to procreate, most have originated from carceral settings.[14]

Even after recognizing the right to procreate, prisons, jails, and immigration detention facilities have continued to put policies in place to prevent individuals in government custody from procreating. Initially, these policies were framed as prohibitions on sexual relationships while incarcerated, regardless of whether they were for procreative purposes.[15] As scientific developments increased the types and accessibility of ARTs, the government continued to deny incarcerated people the ability to procreate, this time preventing procreation through both sexual and non-sexual means.[16]

With reproductive freedoms at a constant risk, and with advances in medical knowledge changing our understanding of reproduction,[17] it is necessary to reevaluate the right to procreate. Specifically, we must address

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579 U.S. 582, 609–24 (2016) (finding that requirements for abortion clinics were an undue burden when they forced most clinics to close despite limited medical support for the requirement). In addition to the previous cases, there were decisions during this time period addressing First Amendment rights related to abortion and government funding of reproductive health.

11. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (finding the right to consensual sex between adults in private); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing right to access contraceptives as a matter of privacy); Eisenstadt v. Baird, 405 U.S. 438, 447–55 (1972) (granting privacy protections for contraceptives regardless of marital status).

12. *See infra* Part I.C (discussing debates over reproductive rights and the impact the various approaches have in reproductive choices).

13. *See* MICHELE GOODWIN, POLICING THE WOMB 15–27 (2020) (describing how the government continues to limit procreation by policing, incarceration, and deceptive voluntary sterilization programs).

14. *See infra* Part I.D.

15. *See infra* Part II.B.

16. *See* Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (denying an incarcerated person the ability to procreate through sexual or non-sexual means); Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (same).

17. *See generally* Ali H. Brivanlou & Norbert Gleicher, *The Evolution of Our Understanding of Human Development Over the Last 10 Years*, NATURE COMMC'NS, July 2021, at 1 (providing an overview of the changes in scientific understandings of reproduction and providing citations to more in-depth descriptions).

how this right has been treated within U.S. carceral settings.[18] Prisons are one of the few places where the right to procreate has been examined independent from the bundle of family and privacy rights.[19] This indicates that the right to procreate can effectively be separated from other family and privacy rights, and provides a source to evaluate how this right should be interpreted on its own. Additionally, incarcerated people have fewer protections for their constitutional rights.[20] Therefore, using prisons as the starting place ensures that protections for procreation are strong enough to withstand even weakened levels of constitutional protection. Further, creating a right to access ARTs by leveraging the right to procreate could result in a constitutional protection for all people. In the prison setting, the state is given more power to curtail a right; however, to do so requires that all avenues for protecting the right be considered.[21] While restricting sexual procreation in prison may be done for legitimate penological reasons, restricting non-sexual procreation through ARTs is harder to justify. This indicates that access to ARTs is protected by the right to procreate. Identifying a right to ART access in prisons also extends that right outside of carceral settings, which can provide a tool to address restrictions on IVF and other ARTs.

Part I provides background on the development and application of the right to procreate. This Part highlights how the right to procreate has been lumped into other family and privacy rights, creating a limited understanding of this right on its own. Part II begins by looking at how constitutional rights are applied in prisons, then, using this understanding, evaluates the right to both sexual[22] and non-sexual[23] procreation while incarcerated. Part III then

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18. Additionally, the right to procreate in prisons has recently been getting attention abroad. *See Right to Life Includes Convict's Right to Procreate: Delhi High Court*, NAT'L HERALD INDIA (Dec. 23, 2023), https://www.nationalheraldindia.com/national/right-to-life-includes-convicts-right-to-procreate-delhi-high-court (explaining a recent court ruling in India that protected incarcerated people's right to procreate through non-sexual means); Ariane Amado, *Do Prisoners Have the Right to Create a Family?*, 236 PRISON SERV. J. 55 (2022) (explaining a European Court of Human Rights ruling that limits states from interfering with incarcerated individuals' rights to procreate through ARTs, then comparing the ability of incarcerated people in the U.K., France, and Belgium to access ARTs).

19. *See infra* Part I.D (addressing the limited case law defining the right to procreate), Part IV.A (discussing the bundle of family and privacy rights).

20. *See* Turner v. Safley, 482 U.S. 78, 84–99 (1987) (creating the test for limiting constitutional rights within prisons).

21. *Id.* at 90.

22. "Sexual procreation," as I am using it, refers to procreation that occurs directly from sexual intercourse, without the involvement of outside reproductive material. For example, using donor sperm (from someone who collected and transferred ownership of their sperm prior to or independent of the sexual acts) during sexual intercourse would not count as "sexual procreation," since it involves using the genetic material of someone not participating in the sexual relationship.

23. I am using the phrase "non-sexual procreation" to refer to any means of procreation not covered in traditional "sexual procreation." This includes procreation that uses donor eggs or sperm, IVF

dives deeper into how the right to procreate should be applied in prisons. The analysis focuses on *Skinner*'s foundational rationale for the right to procreate and uses current medical and scientific understandings to contextualize that right today. Part III concludes by determining that access to ARTs in prison balances the penological interests of prison operations with the constitutional rights of incarcerated people, finding that the right to procreate includes access to ARTs. Part IV then explains how the right to access ARTs in prisons can effectively defend reproductive freedoms involving ART use outside of prisons.

I. THE RIGHT TO PROCREATE

In 1942, the Supreme Court first recognized a fundamental right to procreate in *Skinner v. Oklahoma*.[24] *Skinner* challenged Oklahoma's Habitual Sterilization Act, a law which sexually sterilized individuals who were convicted of three or more "felonies involving moral turpitude."[25] The decision focused largely on how the state drew "conspicuously artificial lines" when classifying felonies as "involving moral turpitude."[26] This classification system ultimately resulted in different punishments for nearly identical crimes.[27] The Court used larceny and embezzlement as examples.[28] Under Oklahoma law, these crimes involved virtually the same elements but with slightly different intent requirements.[29] Based on this slight distinction, larceny was classified as a felony involving moral turpitude while embezzlement was classified as a normal felony.[30] Thus, someone convicted of larceny three times could be sterilized under Oklahoma's Habitual Sterilization Act, but a person who caused nearly the same harms by committing embezzlement three times would not face sterilization.[31] The Court noted that the arbitrary distinction between crimes was significant because that distinction determined whether the punishment intruded on the ability to procreate, something the Court described as "one of the basic civil

(where the egg is fertilized outside the body), and surrogacy that occurs through either IVF or artificial insemination.

24. 316 U.S. 535, 541 (1942).

25. *Id.* at 537. According to the statute, the court would enter a judgment for sexual sterilization after a judge or jury had determined that the individual (1) met the definition of "habitual criminal," and (2) could be sterilized "without detriment to his or her general health." *Id.*

26. *Id.* at 536.

27. *Id.* at 542.

28. *Id.*

29. *Id.* at 539.

30. *Id.* at 538.

31. *Id.* at 539.

rights of man."[32] To illustrate the harms of arbitrary sterilization, the Court explained that "[m]arriage and procreation are fundamental to the very existence and survival of the race" and that "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects."[33] This provided the first indication of a fundamental right to procreate.

Despite arguments that the Court only intended *Skinner* to be an Equal Protection case,[34] there is a general understanding that *Skinner* articulated a fundamental right to procreate.[35] This understanding comes largely from how the Court itself has referenced and utilized the case, citing *Skinner* in multiple opinions as an example of a fundamental right.[36] While some cases describe the fundamental right in *Skinner* as the "right not to be sterilized,"[37] most cases reference *Skinner* for the right to procreate.[38] But what exactly does the right to procreate mean?

Beyond these occasional mentions, the Court has elaborated on how to interpret and apply the right to procreate as a self-standing right in only two other opinions. In *Cleveland Board of Education v. LaFleur*, the Court found that a government employer's overly restrictive maternity leave policy

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32. *Id.* at 541.

33. *Id.*

34. *See* VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 89–160 (2008) (arguing that *Skinner* should be read as an Equal Protection case that was used to distance the U.S. from racial and class-based eugenics occurring during WWII, not as a substantive due process case that recognized the right to procreate).

35. *See* KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10820, PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE, AND SEXUAL ACTIVITY 3–4 (2022) (stating that *Skinner* found a fundamental right to procreate and discussing the right alongside other family and privacy rights).

36. *See* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (listing "rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect," including "procreation" as provided by *Skinner*); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (listing cases that have constructed the right to privacy in different areas, including *Skinner* "with procreation"); Zablocki v. Redhail, 434 U.S. 374, 385 (1978) (explaining that certain decisions, such as the right to procreate, are protected under privacy rights); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977) (listing privacy rights the Court has protected, including procreation). Additionally, concurring and dissenting opinions have mentioned *Skinner* as an example of the right to procreate. *See* Doe v. Bolton, 410 U.S. 179, 211–13 (1973) (Burger, J., concurring) (listing fundamental rights, including "the right to procreation" as provided in *Skinner*); Webster v. Reprod. Health Servs., 492 U.S. 490, 547 (1989) (Blackmun, J., dissenting); Whisenhunt v. Spradlin, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting) (providing examples of areas of privacy that are protected from "governmental disclosure or interference" and citing *Skinner* for the privacy right of "procreation"); Hollenbaugh v. Carnegie Free Libr., 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (citing *Skinner* as an example of the right to privacy, specifically in the area of procreation).

37. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 273 (2022) (stating that *Skinner* established the "right not to be sterilized"); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (listing liberty interests that "have not been defined precisely" including *Skinner* and "sterilization").

38. *See* cases cited *supra* note 36.

violated employees' ability to exercise their right to procreate without "unwarranted government intrusion."[39]

In *Dandridge v. Williams*, the state of Maryland appealed from a District of Maryland case that invalidated a social welfare program which provided additional aid for every child a family had until the eighth child, at which point, the total aid amount would not increase.[40] In their briefing, appellants argued in that the cap on aid interfered with their fundamental right to procreate by limiting their ability to care for more children.[41] While the majority did not address the fundamental rights issue, Justice Marshall dismissed the appellees' arguments within a footnote in his dissenting opinion, stating "the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*."[42] Outside of these two cases, the Court has only discussed the right to procreate when bundled with other family and privacy rights.[43]

To complicate the process of understanding this right even more, U.S. legal scholars tend to gravitate towards simplifying rights into negative rights rather than positive rights.[44] *Negative rights*, also commonly referred to as *rights of noninterference*,[45] are protections against governmental interference in specific areas.[46] Rights to noninterference include ideas such as restrictions on the government from interfering with most speech and forms of expression, the right to determine one's own religious beliefs and to practice them within reason, and protections against governmental searches of private property.[47] *Positive rights* generally refer to rights one is entitled to receive from the government.[48] Examples of positive rights include government-provided or -subsidized healthcare, education, and recreation programs.[49] Despite the positive and negative distinction, rights rarely fit

39. 414 U.S. 632, 640–48 (1974).

40. 397 U.S. 471, 472–73 (1970).

41. Brief for Appellees, Dandridge v. Williams, 397 U.S. 471 (1970) (No. 131), 1969 WL 119896, at *31–34, 39–41.

42. *Dandridge*, 397 U.S. at 520 n.14 (Marshall J., dissenting).

43. *See* cases cited *supra* note 36.

44. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872–90 (1986) (evaluating the traditional notion that "the Constitution is a charter of negative rather than positive liberties").

45. I use "right(s) of noninterference" throughout this article. However, where a quoted sources uses "negative right," the original wording of the source is retained.

46. *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31, 42–43 (2018).

47. *See id.*

48. *See id.* at 43–45.

49. *See id.*

perfectly into one category.[50] The tendency to interpret rights as rights of noninterference has especially impacted discourse around the right to procreate.

A. The Right to Procreate as a Right of Noninterference

Following the trend to classify every right as a right of noninterference, the leading understanding of the right to procreate is that of noninterference from the government.[51] In general, noninterference in the right to procreate requires that the government refrain from intervening in a person's choice or ability to procreate.[52] However, noninterference can take multiple forms.

1. Narrow Noninterference

Some scholars frame the right to procreate as a prohibition on the government permanently taking away an individual's reproductive ability by physically intruding into an individual's body.[53] However, this interpretation overlooks important aspects in the limited amount of precedent on the right to procreate. It provides a narrow right that only prohibits what sterilization would look like under *Skinner*—state intrusion into an individual's body to remove their ability to procreate.[54] Under this belief, it would not violate the right to procreate if the government restricted or prohibited access to ARTs because doing so would not intrude into an individual to physically alter their reproductive ability.[55]

While this understanding of the rights of noninterference is certainly the easiest to defend as a minimum requirement under *Skinner*, the right to procreate should not be limited to only the most extreme forms of interference. For example, *LaFleur* suggests that the government violates the right to procreate when it acts in a way that deters an individual from

50. *See generally id.* (explaining how rights often do not fall into the clear-cut positive or negative categories).

51. Glenn Cohen, *The Right(s) to Procreate and Assisted Reproductive Technologies in the United States*, *in* THE OXFORD HANDBOOK OF COMPARATIVE HEALTH LAW 1009, 1011 (David Orentlicher & Tamara K. Hervey eds., 2020).

52. *Id.*

53. *Id.* at 1013.

54. *Id.*; Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1485 (1995) (arguing that, if *Skinner* protects from governmental interference in the body to influence reproduction, "then *Skinner* protects only the right to refuse abortion and carry a coital pregnancy to term, as well as the right to resist compulsory contraception or sterilization").

55. Cohen, *supra* note 51, at 1013.

choosing when to exercise this right.[56] This signifies two important intentions of the Court.

First, the right to procreate protects more than just physical interference in the body. In *LaFleur*, the government action that violated the right to procreate was a maternity policy that deterred teachers from becoming pregnant.[57] Unlike the sterilization in *Skinner*, the right to procreate was violated without physically intervening in the bodies of the teachers affected by the policy.

Second, the right to procreate does not only prevent the government from permanently prohibiting an individual from having children; it also prevents the government from temporarily interfering with an individual's choice to procreate. In *LaFleur*, the school district's maternity policy did not prevent teachers from *ever* having children, instead the policy deterred them from having children when they wanted to.[58] With these two takeaways, the right to procreate should not be seen as a narrow right to noninterference that requires intrusion into the physical body to permanently prevent a person from procreating.

2. Broad Noninterference

As driven by Professor John Robertson,[59] a more plausible noninterference theory of the right to procreate is the understanding that the

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56. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974). The court in *LaFleur* did not exclusively address the right to procreate, but rather, the "freedom of personal choice in matters of marriage and family life," including the right to procreate as provided by *Skinner*. *Id.* at 639. Despite privacy and autonomy in family life including multiple protected areas—such as marriage, sexual privacy, the freedom to have children, certain protections for choosing to prevent pregnancies, and how to raise children—the decision in this part of the case is directly relevant to the freedom to procreate without governmental influence.

57. *Id.* at 634–36, 640 ("By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect 'one of the basic civil rights of man,' the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." (citation omitted)).

58. *Id.* at 640.

59. *See generally* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (4th ed. 1996) (arguing for the right to reproduce using reproductive technology); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) (addressing legal regulations of emerging reproductive technologies); John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233 (1995) (responding to criticism against his arguments in favor of a right to use reproductive technology); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439 (2003) [hereinafter *Procreative Liberty in the Era of Genomics*] (explaining legal regulations of genetic selection through reproductive technology); John A. Robertson, *Assisting*

state cannot act in a way that would prevent individual choice in procreative matters.[60] As addressed above, this theory of noninterference includes protections against the government physically taking away an individual's ability to procreate as well as governmental policies that influence the choice of whether and when to have children.[61] Further, some argue that noninterference also prevents the state from intervening into individuals' choices on how they procreate.[62] This includes the choice to procreate within a marriage or not, to use donated genetic material or not, to procreate through traditional sexual reproduction or in vitro fertilization (IVF), and to procreate by giving birth or by using a surrogate.[63]

The ability to make reproductive choices related to marriage, choice of genetic material, and sexual or non-sexual reproduction are all constitutionally protected, but not directly or exclusively by the right to procreate. For example, courts have found that the abortion and contraceptive cases protected the ability to conduct research on embryos.[64] Additionally, the choice to have children outside of marriage is protected not by the right to procreate, but rather by equal protection arguments arising from illegitimacy laws[65] and sexual privacy rights.[66] Similarly, marital privacy and parentage laws have enabled couples to procreate with genetic material from someone outside of the marriage, thus creating the understanding that a genetic relationship to a child does not create a legal parent-child relationship and enabling individuals to procreate with donated reproductive material.[67]

Reproduction, Choosing Genes, and the Scope of Reproductive Freedom, 76 GEO. WASH. L. REV. 1490 (2008) (addressing ethical and legal issues related to reproductive technology).

60. Cohen, *supra* note 51, at 1012.

61. *See supra* Part I.A.1.

62. Cohen, *supra* note 51, at 1013–14.

63. *Id.*; *Procreative Liberty in the Era of Genomics*, *supra* note 59, at 447 (arguing that the right to procreate includes the right to have genetic children).

64. Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990); *see* Cohen, *supra* note 51, at 1015 (explaining the Illinois case and stating that "the case is almost 30 years old and has not been much discussed"); Forbes v. Napolitano, 236 F.3d 1009, 1012 (9th Cir. 2000) (striking down a fetal research ban on similar grounds).

65. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (finding a state law that prohibited children of unmarried mothers from acquiring property of their deceased mother was unconstitutional, and that the state could not justify the discrimination based on its goal of deterring the immoral behavior of having a child out of wedlock); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968) (holding that it violated the Equal Protection Clause to deny an unmarried mother recovery on an insurance claim for the wrongful death of her son).

66. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that right to contraceptives could not be limited to just married couples).

67. *See* Lehr v. Robertson, 463 U.S. 248, 267 (1983) (holding that the Equal Protection Clause permits states to give different adoption rights to a mother and genetic father when the mother has an established custodial relationship with the child and the father has never developed a custodial, personal, or financial relationship); Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (affirming the marital

On the other hand, there has been very little case law that has evaluated the rights to surrogacy under either the right to procreate or other family and privacy rights.[68]

These examples highlight how the right to procreate *might* be a right to broad noninterference in deciding how to procreate. However, since these examples are rooted in other rights or legal foundations, it is unclear whether the right to procreate necessarily encompasses them.[69] At best, from what we know now, the right to procreate is not inconsistent with broad noninterference in deciding when and how to have children.

B. The Right to Procreate as a Positive Right

Additionally, some have argued that the right to procreate is a positive right and, therefore, the government should act to increase access to procreation.[70] This idea extends beyond typical beliefs that the Constitution only provides for negative rights.[71] A positive rights approach can include reducing social barriers to procreation—such as the costs of having children deterring an individual from procreating, or the social pressures on women and married couples to have children to be recognized as a family—and increasing the availability of ARTs that allow people to procreate who would not otherwise be able to. However, there is no robust support either for or against interpreting the right to procreate as a positive right.

For one, the Court's brief mention of the right to procreate in *Dandridge* seems to dismiss the argument that the government has an obligation to take affirmative steps to allow individuals the freedom to choose whether to procreate.[72] If the government does not violate the right to procreate by

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presumption of parentage that gives legal parental rights to the spouse of the person who gave birth, not a genetic parent outside of the marriage); Obergefell v. Hodges, 576 U.S. 644, 667–69 (2015) (recognizing a state interest in protecting the children of same-sex couples, even when both parents do not share a genetic relationship with the child); Pavan v. Smith, 582 U.S. 563, 566 (2017) (expanding the right of married women to both be listed on the birth certificate of a child that one of them gave birth to).

68. Cohen, *supra* note 51, at 1014–15.

69. *See* Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's* Children of Choice, 52 WASH. & LEE L. REV. 135, 161 (1995) (arguing that the procreative liberty is based on privacy rights of marriage, not procreation in and of itself).

70. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 73 (2015) ("[I[n order to achieve equality of access, the government likely needs to affirmatively create opportunities for financial assistance to those seeking access to assisted reproduction, which could be done in part through public and private insurance programs.").

71. *See generally* Currie, *supra* note 44 (explaining the traditional notion that the Constitution only provides for negative rights).

72. Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (Marshall J., dissenting) (highlighting that Justice Marshall dismissed the fundamental rights argument in his dissenting opinion, while the majority did not address it at all).

providing proportionally less aid to larger families,[73] then it would be difficult to argue that the government has an obligation to eliminate barriers to choosing to have children or deciding how many to have. On the other hand, *Dandridge* did not analyze the obligation to provide procreative support; the case only addressed how the state did not violate the right to procreate by limiting governmental support after families had a certain number of children.[74] As such, the case should not be read as finding that the government had no positive obligation to eliminate barriers to reproductive choice. Rather, the case simply recognized that the state did not have an obligation to eliminate *all* barriers that could influence the choice to have children.

Similarly, when reading the right to procreate as the right to have one's own genetic children,[75] providing reproductive healthcare and using ARTs may be the only way for some people to exercise this right. Despite ART access being necessary for some people to have genetic children, it is commonly believed that the government is not required to provide or increase access to ARTs.[76] As Radhika Rao argues, "even if *Skinner* does create a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to assure the exercise of procreative choice . . . ."[77] However, like the argument for positive government obligations to eliminate barriers impacting the choice to procreate, there is no evidence that the right to procreate is inconsistent with a positive right to provide access to ARTs and reproductive care.

C. The Right to Procreate as an Independent Right

The right to procreate has largely been examined in context with other rights stemming from abortion, contraceptives, and sexual privacy.[78] With this in mind, some have argued that the right to procreate should be

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73. *Id.*

74. *See generally id.*

75. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 423 (1983); Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1118 n.339 (providing an example of procreative liberty as the "right[] to conceive and raise one's children").

76. *See* Massie, *supra* note 69, at 162 (arguing the right to procreate only covers sexual procreation and does not provide protections for ARTs, even for people with fertility issues); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078–80 (1998) (arguing protections for ART use should be limited between couples, as to not involve third parties).

77. Rao, *Constitutional Misconceptions*, *supra* note 50, at 1485.

78. *See supra* Part I.A.2.

understood in context with these other areas of family and privacy rights.[79] For example, Ann MacLean Massie argued that the right to procreate is founded on the rights to marriage and sexual intimacy within marriage.[80] Similarly, in explaining how the Supreme Court would likely rule on ART use as procreative liberty, Carl Coleman used arguments from abortion and contraceptive cases to conceptualize a potential response.[81]

While constitutional rights often build on each other, the reversal of abortion rights in *Dobbs* calls into question the strength of other sexual and privacy rights—especially in light of Justice Thomas's concurring opinion.[82] Despite the bundling of procreation with other rights, *Skinner*'s recognition of the right to procreate came before rights such as sexual privacy between consenting adults,[83] rights to contraceptive use,[84] the now-overturned right to abortion,[85] and modern marriage rights.[86] Further, the right to procreate was found during a time when the U.S. was trying to distance itself from the eugenics movement of WWII.[87] Regardless of how the U.S. continues to limit reproductive rights,[88] it is unlikely the Court would overrule *Skinner* because of its relationship to the American ideals of freedom and self-determination—two traits fundamentally at odds with eugenics and other government programs to forcibly prevent procreation. As such, the "unbundling framework" should be used to determine what the right to procreate independently protects.[89]

D. Litigating the Right to Procreate

Regardless of its construction as a positive or negative right, or the extent to which it provides for noninterference, the right to procreate should be evaluated as a separate and distinct right from family, sexual, and privacy

79. Cohen, *supra* note 51, at 1011 ("Some scholars have discussed a 'right to procreate' alongside a 'right not to procreate.'").

80. Massie, *supra* note 69, at 161.

81. Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 66–67 (2002).

82. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

83. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

84. Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

85. Roe v. Wade, 410 U.S. 113, 154 (1973).

86. Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to interracial marriage); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (right to same-sex marriage).

87. *See* NOURSE, *supra* note 34, at 89–160.

88. *See* GOODWIN, *supra* note 13, at 15–24.

89. Cohen, *supra* note 51, at 1011.

protections. Without much precedent to flesh out what the right to procreate entails, at minimum it prohibits government interference in a person's ability to procreate through medically and legally unassisted means (i.e., "traditional" sexual procreation or unregulated forms of ART).[90] Not only does this include forced sterilization, but it also prevents the government from imposing certain barriers or deterrents on procreation.[91] Similarly, the it prohibits government from taking permanent or temporary actions to prevent procreating.[92] While few precedents have set baseline protections, there are few indications that the right to procreate has any upper limits that would prevent its application to ARTs.

In addition to the Supreme Court sparsely defining the right to procreate, few individuals have argued that their procreative rights have been violated. As explained above, other sexual, privacy, and family rights have provided more detailed protections with a more robust set of precedents to build on.[93] This makes the bundle of rights a more useful tool to argue for a non-marital right to access certain ARTs.[94]

Furthermore, most attempts by the government to limit procreation have been "facilitated through coercive means" or were achieved as secondary effects to policing and incarceration.[95] Reproductive rights advocacy has generally failed to center forced sterilization in the movement.[96] Advocacy often focuses on abortion and privacy rights instead, which further excludes legislative and judicial advancements on the right to procreate.[97] This leaves incarceration as one of the few areas where this right has been explicitly challenged through litigation.

II. PROCREATING IN PRISON

As one of the few places where the right to procreate has been directly challenged, prisons can provide insight into how to analyze this right. Prisons can therefore help us to understand how this right can be applied both inside and outside of carceral settings. The government traditionally must meet a high bar to restrict constitutional rights, but that bar is lower when it seeks to

90. *See supra* Part I.A.
91. *See supra* Part I.A.1.
92. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974).
93. *See supra* Part I.C.
94. *See supra* Part I.C.
95. *See* GOODWIN, *supra* note 13, at 14–27.
96. *See* Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1632 (2022).
97. *Id.*

restrict the constitutional rights of incarcerated people.[98] As such, the constitutional rights applied in prisons are the absolute bare minimum—rights that are strong enough to withstand even weakened levels of protection. In other words, the right to procreate in carceral settings represents the floor for this right's protections in non-carceral settings.

In this Part, I first look at how constitutional rights are applied in prisons, identifying both the process and standards used to determine whether a right extends to those in prison. I then turn to past decisions where courts have completely blocked access to the right to procreate while incarcerated. Applying the right to procreate as a stand-alone right, I argue that the decisions restricting access to assisted reproductive technology (ART) in prisons were based on both legal and medical misunderstandings of human reproduction. I conclude by arguing that the constitutional right to procreate should be extended to non-sexual forms of reproduction while incarcerated.

A. Fundamental Rights in Prison

Although "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,"[99] an incarcerated person "retains those . . . rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[100] In *Turner v. Safley*, the Supreme Court reaffirmed the modified application of constitutional rights to incarcerated persons.[101] *Turner* created a two-pronged test, with the second prong containing the four Turner factors, used to analyze the extent to which prison regulations can burden a constitutional right in prisons.[102]

The first prong of the *Turner* test determines whether the constitutional right in question is inconsistent with the goals of incarceration.[103] If the right

98. *See infra* Part II.A.

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

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

101. Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). Since establishing the *Turner* test, Congress has implemented additional protections for the free exercise of religion, requiring a different test for claims related the Free Exercise Clause and Establishment Clause of the First Amendment. Additionally, it is important to note that the standard for restricting constitutional rights is different for pretrial detainees, as there are more protections given to the rights of people who have not yet been convicted.

102. *Id.* at 89–90. Often the first prong is combined into the analysis for the second prong; however, a determination that the first prong fails is enough to deny a constitutional right in carceral settings. *See* Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (discussed *infra* Part II.C.1). Additionally, the first prong evaluates the constitutional right itself, while the second prong looks at the prison regulation that burdens the right. *Id.* As such, I look at the analysis as two separate prongs. *Id.* at 620.

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

is not inconsistent with the goals of incarceration, the court then moves onto the second prong—the *Turner* factors.[104] To do so, *Turner* provides four factors to determine whether a prison regulation justifiably burdens the constitutional rights of the incarcerated individual.[105] The Turner factors are: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";[106] (2) "whether there are alternative means of exercising the right that remain open to prison inmates";[107] (3) what "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally";[108] and (4) whether there are "ready alternatives" the prison could use to accomplish the goal while still affording the incarcerated person their right.[109]

In *Turner*, the Court applied this test to two issues: communication between inmates and marriage.[110] For communication between inmates, the Court ruled the first prong was met because communication was a form of free speech and expression protected under the First Amendment, and was not inconsistent with the goals of incarceration.[111] Moving to the second prong, the Court applied the *Turner* factors, ultimately holding the prison's restriction on communication was constitutional because (1) the regulation of First Amendment speech rights between inmates was rationally connected to the legitimate governmental interest of preventing prison gangs; (2) neither the prison officials nor the plaintiffs in the case could propose any other reasonable means of exercising free speech rights between inmates; (3) the only other proposed means to solving the issue would have required more work and would not have been as effective; and (4) the restriction only limited speech and expression between some groups of people, but did not prohibit all forms of constitutionally protected expression and speech.[112]

On the other hand, under the *Turner* test, the prison's restriction on marriage was found to burden a constitutionally protected right of incarcerated people.[113] Looking at the first prong, the Court determined that

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104. *Id.* at 89–90. Note that a constitutional right does not have to be *consistent* with the goals of incarceration, rather, the right must *not be inconsistent*. *Id.* at 95. As discussed more below, the constitutional right does not need to advance the goals of incarceration to be protected; instead, the right must not operate counter to the goals of incarceration.

105. *Id.* at 89–90.

106. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

107. *Id.* at 90.

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

109. *Id.* at 90–91.

110. *Id.* at 91.

111. *Id.* at 91–93.

112. *Id.*

113. *Id.* at 94–96.

the right to marriage is not inherently inconsistent with the goals of incarceration because certain aspects of marriage can exist within confinement.[114] Turning to the *Turner* factors in the second prong, the prison's restriction on marriage was found unconstitutional.[115] The Court reasoned that there was no evidence that the regulation was related to, or could further, the prison's stated interests of promoting security and rehabilitating individuals who have a history of dependency and abuse.[116]

Prison regulations alleged to burden a constitutional right of incarcerated people are analyzed under the *Turner* framework.[117] This includes challenges to prison regulations that restrict rights to association, sexual activity between consenting adults, and procreation. The following Parts provide an overview of how courts have applied the *Turner* test to rights related to the ability to have children.

B. Sexual Procreation and Freedom of Association in Prison

Traditionally, prisons have indirectly limited the ability for incarcerated people to procreate by enacting policies that prohibit physical relationships inside detention facilities.[118] Under the *Turner* test, prison regulations that prohibit or restrict conjugal visits and other forms of sexual relationships have been upheld based on the idea that constitutional rights to sexual relationships do not withstand incarceration, thus failing the first prong.[119] Further, while some forms of First Amendment freedoms survive incarceration, courts have widely determined that association—including restricting associative rights necessary for sexual or procreative relationships—can constitutionally be limited due to the "exigencies and operational considerations of [the] penal system."[120]

Even if there was a constitutionally protected right to sexual relationships, which would meet the first prong of the *Turner* test, it is unlikely that a right to sexual relationships would withstand the four factors

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114. Turner v. Safley, 482 U.S. 78, 96 (1987).

115. *Id.* at 97.

116. *Id.* at 97–99.

117. *Id.* at 84.

118. *See generally* Rachel Michael Kirkley, Note, *Prisoners and Procreation: What Happened Between Goodwin and Gerber?*, 30 PEP. L. REV. 93 (2002) (discussing the limitation of the right to procreate while incarcerated); Sarah L. Dunn, Note, *The "Art" of Procreation: Why Assisted Reproductive Technology Allows for Preservation of Female Prisoners' Right to Procreate*, 70 FORDHAM L. REV. 2561 (2002) (discussing the limitations of the right to procreate focused on incarcerated women).

119. Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994); *see* Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) (citing Kentucky Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989) (no due process right to unfettered visitation)).

120. *See Hernandez*, 18 F.3d at 137; *Gerber*, 291 F.3d at 621.

of the second prong in light of the proposed legitimate penological interests at stake. For example, states have justified restrictions on sexual relationships in prisons by citing the need to prevent sexually transmitted infections, limit costs from pregnant inmates, further the goal of isolation in imprisonment, and promote prison security.[121] Similarly, denying conjugal visits has been justified based on the high costs associated with supervising conjugal visits, the lack of evidence that conjugal visits increase good behavior or decrease recidivism, the need to prevent disease from entering prisons, and the penological goal of isolating people during incarceration.[122] While some of these justifications are based on misguided ideas or could be accomplished through means that do not restrict rights to procreate sexually, courts will likely continue to rely on the justifications of safety and control to uphold prison regulations that restrict incarcerated individuals' sexual rights.

Moreover, individuals have been unsuccessful in bringing claims alleging that policies prohibiting sex unconstitutionally prohibit their right to procreate. For example, in *Hernandez v. Coughlin*, Hernandez was denied conjugal visits with his wife.[123] The Second Circuit explained that while prisoners have the right to marry, "[r]ights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting."[124] To further explain the limitation on rights during incarceration, the court explained that "inmates possess the right to maintain their procreative abilities for later use once released from custody, even though this right is restricted."[125] *Hernandez* created two understandings about sexual relationships while incarcerated. The first is that incarcerated people do not have a constitutionally protected right to sexual relationships.[126] The second, although misguided, is that incarceration does not violate the right to procreate because prisons do not take affirmative steps to strip incarcerated people of their ability to procreate after they are released from custody.[127] Whether correctly determined or not, the focus on sex and sexual procreation has enabled courts and prisons to justify a broad curtailment of the right to procreate.

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121. Kirkley, *supra* note 118, at 101–02.

122. Molly Hagan, *Controversy and Conjugal Visits*, JSTOR DAILY (Feb. 13, 2023), https://daily.jstor.org/controversy-and-conjugal-visits/.

123. *Hernandez*, 18 F.3d at 135.

124. *Id.* at 137.

125. *Id.* at 136.

126. *Id.* at 137.

127. *Id.* at 136.

C. Non-Sexual Procreation in Prisons

On the other hand, prison regulations that prevent non-sexual procreation cannot use the same justifications as those used to prohibit sexual procreation. Because sex and procreation are two distinct acts,[128] courts should not dismiss the right to procreate based on the ability for prison administrators to limit sexual relationships. This approach requires courts to apply the *Turner* test to procreation directly, first examining whether the right to procreate survives incarceration or whether the right is "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," and then analyzing the prison's justifications for the restrictions under the four *Turner* factors.[129] So far, there have been two major cases that have examined the right to non-sexual procreation while incarcerated.[130] I describe those two cases below. In Part III, I provide an analysis of the decisions.

1. *Goodwin v. Turner*—No Burden under the *Turner* Factors

With a little less than eight years until his release date and about four years until he was eligible for parole, Steven Goodwin filed a request with the prison where he was incarcerated, asking the prison to allow him to collect his sperm and send it to his wife so she could attempt to conceive.[131] On appeal, the Eighth Circuit refused to decide whether the right to procreate was a constitutional right that survived incarceration.[132] Instead, the court assumed it did and subsequently analyzed the factors in the second prong of the *Turner* test.[133]

Here, the prison argued that if it were to treat all prisoners equally, it would be required to provide both men and women equal opportunities to procreate.[134] In looking at the first factor, the court found that "treating all

128. *See infra* Part II.D.

129. Turner v. Safley, 482 U.S. 78, 95–96 (1987).

130. *See* Percy v. State Dept. of Corr., 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995) (denying an incarcerated person the ability to use artificial insemination); State v. Oakley, 629 N.W.2d 200 (Wis. 2001) (upholding a probation condition that prohibited an individual from procreating until he could support another child). In addition to these cases, the use of ARTs to exercise or preserve procreative rights while in prison has been challenged elsewhere; however, the other decisions follow the rulings of the two cases described above.

131. Goodwin v. Turner, 908 F.2d 1395, 1396–97 (8th Cir. 1990).

132. *Id.* at 1398.

133. *Id.* Despite these cases sharing the name "Turner," it is important to note that any reference to the "*Turner* test" is to the test developed in *Turner v. Safley*; *Goodwin v. Turner* simply applies that framework.

134. *Id.* at 1400.

inmates equally" was a legitimate penological interest that met the "valid, relational connection" requirement of the first factor.[135] Building off the equality issue, the court ruled that the third factor also favored the prison because the goal of equality would require large amounts of money and resources to be allocated to women who wanted to exercise their right to procreate while incarcerated.[136] The court also found the second and fourth factors favored the prison because there were no clear alternatives the prison could pursue that protected the right to procreate while maintaining prison functionality.[137] As such, the court concluded that it was constitutional to prevent Goodwin from attempting to procreate through non-sexual means because the prison's regulation met the burden of the second prong of the *Turner* test.[138]

2. *Gerber v. Hickman*—No Constitutional Right under the First *Turner* Prong

About a decade later, William Gerber made a request similar to Goodwin's. He asked the prison he was incarcerated in for permission to collect his sperm and send it to his wife so she could use it in an artificial insemination procedure outside of the prison.[139] In *Gerber*, the Ninth Circuit began with the first prong of the *Turner* test by analyzing whether the right to procreate survives incarceration.[140] The court pointed out that "[i]ncarceration, by its very nature, removes an inmate from society. A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children."[141] The court also noted that, after release from incarceration, a person can return to their family and friends, "[b]ut not until then."[142] The court further reasoned that, unlike the permanent sterilization in *Skinner*, denying access to artificial insemination does not remove the potential ability to procreate after release from custody.[143] As such, the court determined there was no constitutional right that survives incarceration and thus did not analyze the *Turner* factors.[144]

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135. *Id.* at 1399.
136. *Id.*
137. *Id.*
138. *Id.* at 1400.
139. Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002).
140. *Id.* at 620–22.
141. *Id.* at 620 (citation omitted).
142. *Id.*
143. *Id.* at 622.
144. *Id.* at 622.

Between these two cases, the respective courts both concluded that the two prongs of the *Turner* test—first, identifying a constitutional right that survives incarceration, and second, determining that the constitutional right is burdened based on an analysis of the *Turner* factors—fail to protect a right to procreate non-sexually while incarcerated. However, the decisions use a misguided understanding of the right to procreate and fail to adequately analyze reproduction with current scientific and medical knowledge.[145]

D. Right to Procreate, Right to Sexually Procreate, or Sexual Rights and Freedoms?

Before analyzing the right to procreate according to modern medical and scientific knowledge, it is important to determine the relationship between advocacy based on the right to procreate and advocacy based on advancing sexual rights and freedoms. Protections for procreative and sexual freedoms are not mutually exclusive, yet they have different limitations and outcomes.

Over the last few decades, there has been an array of discourse around sexuality in prison. In addition to exploring ways to reduce sexual assault in prisons and theorizing the possibility for incarcerated individuals to consent to sexual acts, this discourse has also examined the theory that interpersonal and sexual relationships can benefit the rehabilitation of incarcerated individuals, promote prison safety, and serve as a protection for basic human dignity and psychological well-being.[146] Further, with an updated view on reproduction, it may be found that the four factors in the second prong of the *Turner* test show that prison regulations limiting incarcerated people's sexual rights burden their constitutional rights.[147]

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145. *See infra* Part III.

146. *See* Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, HUM. RTS. BRIEF 17, 19–20 (2006) (explaining how increased self-expression through sexuality can further penological interests, such as promoting family bonds that are important during incarceration and after; teaching about safe sexual practices before release from incarceration; better managing sexually transmitted infections in prisons; decreasing prison rape; and providing better tools for prison officials to understand incidents on sexual conduct within prisons); Prithivi Raj, *Sexual Rights of the Prisoners*, 17 SUPREMO AMICUS 356, 372 (2020) ("If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favour."); Sarah Gross & Ben Stickle, *Policies on Consensual Sexual Activity in State Prisons*, 32 CRIM. JUST. POL'Y REV. 546, 557 (2021) ("[P]olicies should be crafted to allow for some level of sexual relief, take into consideration consensual behavior when punishing inmates, and examine current research on the relationship between violence and consensual sexual behavior."); Kimberly R. Greer, *The Changing Nature of Interpersonal Relationships in a Women's Prison*, 80 PRISON J. 442, 452–53 (2000) (finding that reasons for sexual relationships between female inmates included "economic motivation, sincere relationship, loneliness, curiosity, sexual identity, peer pressure, and other (sexual release and diversion from the boredom)").

147. For example, prohibitions on sexual acts in prison are arguably not related to the penological interest of the state—such as findings that sexual freedoms promote health, safety, and rehabilitation—or

However, rights related to sexual freedoms and the right to procreate should not be lumped together for two main reasons. First, rights related to sexual freedoms are valuable, independent of the role sex can have in procreation. In *Lawrence v. Texas*, the Court determined there is a right to privacy for sexual acts between consenting adults—regardless of marital status—including privacy for non-procreative sexual acts and sexual acts between same-sex adults.[148] Although rights related to sexual freedom were historically limited to married couples,[149] these protections have applied regardless of reproductive ability, providing the same protections for people who are capable of procreating as those who are unable to have children due to age, medical conditions, or use of contraceptives.[150] Further, the First Amendment may offer protections for some forms of sexual acts, or depictions of them, when they serve as forms of speech or expression.[151] Taken as a whole, these examples establish the idea that sexual privacy and expression are protected because of the distinct value that sex can provide to an individual or a relationship, not because of the role sex has in procreation and marriage.

Second, sex is not a necessary aspect of procreation. While traditional sexual reproduction—which involves the creation of an embryo by sperm released during sexual intercourse—is the most common way to procreate, human use of artificial insemination[152] has been documented as far back as

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that the impact of accommodating sexual freedoms are negligible based on potential benefits. *See* Smith, *supra* note 146, at 19–20.

148. 539 U.S. 558, 567, 578 (2003).

149. *See id.* at 564–65 ("The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.").

150. This idea was solidified in *Obergefell v. Hodges* in which the Court held:

> An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

576 U.S. 644, 669 (2015). *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (privacy rights for married couples to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (granting privacy rights for unmarried individuals to access contraceptives).

151. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (finding a First Amendment right to possess and view obscene materials in private); *see generally* James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 866 (2007) (arguing that pornography is not inherently obscene under the First Amendment and can be a form of political speech).

152. The term *artificial insemination* references multiple techniques where sperm is introduced into a person's reproductive system with the hope of the sperm fertilizing an egg. *See infra* notes 131–35 for more information on methods of artificial insemination. Instead of using the term artificial insemination, many medical providers use terms that specify the type of artificial insemination (e.g.,

the late 1700s.[153] Artificial insemination involves collecting sperm that is then inserted either into a person's vagina near the cervix[154] or, with recent technological advances, directly into a person's uterus.[155] Thus, artificial insemination allows for procreation without direct sexual contact between the person providing sperm and the person intending to become pregnant. Other scientific advances[156] and social developments[157] have created additional opportunities for non-sexual reproduction.[158] Beyond offering an alternative method to sexual reproduction,[159] artificial insemination techniques are sometimes the only method by which someone can have children.[160]

Understanding the difference between sexual and procreative rights is important distinction when advocating for reproductive choices. This is especially true in the prison context because advocating for sexual rights does not necessarily protect an individual's ability to procreate. For example, sexual procreation may provide the opportunity for many to reproduce, but not everyone capable of procreation will be able to conceive and have a child through sexual means. Focusing on the right to procreate, rather than sexual

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intrauterine, intravaginal) and sometimes specify the source of the sperm (e.g., "by donor" or "by husband").

153. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS VIEW VIS OBGYN 137, 138 (2015).

154. This method, also referred to as *intracervical insemination* or *intravaginal insemination*, is what most people think of with the term artificial insemination. Intracervical/intravaginal insemination is often done without medical intervention and involves injecting sperm near the cervix or placing sperm in a cup near the cervix. This method can use unprocessed semen or sperm that has been processed/washed by medical professionals to reduce chances of transmitting infectious diseases and to remove motile sperm from the seminal fluid. Elizabeth S. Ginsburg & Zachary Wendell Walker, *Donor Insemination*, UPTODATE (June 8, 2023), https://www.uptodate.com/contents/donor-insemination#H3737261335.

155. *Intrauterine insemination* is a medical procedure in which a healthcare professional inserts processed sperm directly into a person's uterus. Intrauterine insemination should be done in a medical setting and is usually done with a semen sample that has first been processed/washed. Elizabeth S. Ginsburg, *Procedure for Intrauterine Insemination (IUI) Using Processed Sperm*, UPTODATE (Oct. 31, 2023), https://www.uptodate.com/contents/procedure-for-intrauterine-insemination-iui-using-processed-sperm.

156. These include egg retrieval procedures, IVF, and the ability to freeze embryos and gametes.

157. For example, egg and sperm donation and the recognition of surrogacy.

158. *See* Ombelet & Van Robays, *supra* note 153, at 140–42.

159. Non-sexual methods of reproduction may also enable people to have children who medically could reproduce through sexual means, but for various reasons, are unable to do so. Reasons include single women who want to start a family on their own, same-sex couples who use donated reproductive material and/or surrogates, transgender people who have ranging physical and psychological abilities to reproduce, and people who have medical conditions that limit pregnancy or pose a risk of passing on infections to sexual partners or potential children.

160. Non-sexual reproductive technologies provide some the opportunity to reproduce who would not otherwise be able to through traditional sexual reproduction. This is especially important for people with low sperm count, irregular ovulation, and some genetic conditions that an embryo can be screened for through preimplantation genetic testing.

rights, enables society to include more people, including many LGBTQ+ individuals and people with certain medical conditions.

Furthermore, incorporating sexual freedoms in prisons may not extend to sexual reproduction. For example, a prison administrator may remove prohibitions on masturbation, arguing that this provides incarcerated people some sexual freedom while preventing undesired consequences such as assault.[161] However, permitting masturbation does not open the door to procreation because it does not involve another person or a mechanism of transporting reproductive material. Similarly, a prison may permit sex between incarcerated people but prohibit sex between visitors and incarcerated people.[162] With most prisons being single gender, advancing sexual rights by enabling sex between incarcerated people fails to enable sex for procreative purposes.[163] Lastly, concerns over health, safety, and security may allow administrators to easily limit sexual rights in prisons.

Advocating for sexual rights in prisons can only go so far in promoting procreative rights. Sexual rights are still important and can be used to advocate for greater reproductive rights. However, they should not be the center of the advocacy. Similarly, some may argue that the right to procreate

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161. For an argument in favor of advancing sexual rights of incarcerated people through eliminating masturbation bans, *see generally* Yaniv Kot, *The Fundamental Right to Sexual Autonomy in Prison*, 56 AM. CRIM. L. REV. 511 (2019).

162. In *Allen v. Clendenin*, the court upheld an all-male state psychiatric hospital's policy of permitting consensual sex between patients but prohibiting sex between patients and visitors. 2023 U.S. Dist. LEXIS 170457, at *32 (E.D. Cal. Sept. 22, 2023). The court rejected the plaintiff's argument that the policy violated the Equal Protection Clause by discriminating based on sexual orientation. *Id.* at *23–29. The court found "no equal protection claim here where the policy is neutral as to sexual orientation, and there are no allegations showing that the policy was intended to discriminate against persons based on their sexual orientation." *Id.* at 26. Additionally, the court noted that the policy was intended to counter security concerns that contact visits create. *Id.* at 28.

163. This is not to ignore that single-sex prisons may have transgender or intersex people who are capable of procreating with other incarcerated people. As of the end of February 2025, there are around 2,000 transgender people incarcerated in federal prison out of the 155,000 or so total incarcerated, with additional transgender people in state prisons. Jaclyn Diaz, *Federal Prisons Prep to Move Trans Inmates as Early as This Week*, NPR (Feb. 25, 2025), https://www.npr.org/2025/02/21/nx-s1-5305282/trans-inmates-federal-prison-policy-transfers ("[A]s of Feb. 20, the BOP has 2,198 transgender inmates within the federal prison system . . . . The [Bureau of Prisons'] website has since removed references to its trans population."). The relatively small proportion of transgender federal inmates should not justify ignoring the mistreatment and experiences of incarcerated transgender people. Instead, the small number is relevant for contextualizing the possibility for procreation in single-sex prisons. In addition to the small numbers, there are other factors that limit the possibility of transgender people procreating in single-sex prisons, such as policies that assign incarcerated people based on sex assigned at birth rather than gender identity, prison practices of segregating transgender people, medical transitions that restrict the ability to procreate through sexual means, inadequate medical treatment, and personal choices involved with procreation. For an overview of current issues transgender people face in prisons, *see generally* Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, 38 CRIM. JUST. MAG. 3 (2024).

only protects sexual procreation.[164] However, with the countervailing state interest in restricting sexual activity in prisons, the government[165] must consider all possible means of protecting the right to procreate.[166] As such, the remainder of this Article looks at the right to procreate broadly, considering both sexual and non-sexual procreation under the guidance of current medical and scientific understandings of human reproduction.

III. APPLYING SCIENTIFIC UNDERSTANDINGS OF PROCREATION TO THE *TURNER* TEST

Like all constitutional rights, the right to procreate does not automatically end when entering a prison.[167] Rather, a right that is not inherently inconsistent with incarceration can only be completely restricted if the legitimate penological interests outweigh the exercise of any form of the right.[168] This analysis requires identifying the entire scope of what the right protects and investigates how each aspect or form of the right fits into the larger justifications of prison operations. When examining the aspects of the right to procreate and the scope of its protections, one can see that this entire right is not inherently at odds with incarceration. Although parts of this right—such as physical conduct or sexual acts—may justifiably be restricted in a prison setting, the *Turner* test requires an examination of all aspects of a right before deciding that it can be completely restricted in prisons.[169] As such, the analysis below follows the *Turner* test, starting by breaking down the right to determine if it survives incarceration, then applying the *Turner* factors to weigh the justifications on both sides.

A. Prong 1: Procreation as a Right that Survives Incarceration

The first prong of the *Turner* test requires identifying a constitutional right, then determining if the right survives incarceration.[170] As addressed above, even though the right to procreate has not been clearly defined, there

164. *See supra* Part I.A.1.

165. As throughout the article, "government" refers to both the federal government and local governments. This follows from the Fifth Amendment protecting from federal government interference with fundamental rights and the Fourteenth Amendment protecting from state and local government interface with fundamental rights.

166. *See supra* Part I.D.

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

168. *Id.* at 89–90.

169. *Id.* at 96.

170. *Id.* at 84.

is wide acceptance of a constitutional right to procreate.[171] The next question becomes: Does the right to procreate survive incarceration?

In general, "a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[172] Therefore, for a right to survive incarceration, it must not be inconsistent with the purpose of incarceration or run counter to the prison's function. Courts have approached this requirement by identifying the practical and social attributes the right protects and determining how the attributes translate into the realities of being incarcerated and the goals of the correctional system.[173]

For example, when analyzing the right to marriage in *Turner*, the Court identified how marriage can be an expression of support and commitment, can promote religious expression, and can be consummated after release.[174] The Court also noted that marriage is a prerequisite to government benefits and protections such as Social Security benefits, property rights, and legal recognitions of children.[175] The Court concluded that these attributes of the right to marriage provide a mechanism to demonstrate commitment and serve as a means for personal and religious fulfillment—things that can, and already do, exist in a prison setting.[176] Additionally, the Court looked at the state's justifications for preventing incarcerated people from exercising the right to marriage, finding that security and rehabilitation can be legitimate penological interests, but that the restriction on marriage was not reasonably related to legitimate penological interests.[177] Overall, the Court used these factors to determine that the right to marriage is a right that survives incarceration and cannot be unconstitutionally burdened.[178]

In *Gerber*, the court found that there was no fundamental right to procreate that survives incarceration.[179] This decision rested largely on the idea that attributes of the right to procreate (1) protect against physical and permanent sterilization by the government and (2) promote the rights of

171. *See supra* Part I.

172. Pell v. Procunier, 417 U.S. 817, 822 (1974). Although *Pell* created this test specifically for First Amendment rights, it has been extended to other constitutional rights. *See Turner*, 482 U.S. at 95 (applying the test to free speech and marriage rights); Gerber v. Hickman, 291 F.3d 617, 620–22 (9th Cir. 2002) (applying the test to the right to procreate).

173. *Turner*, 482 U.S. at 96–97. *Turner* used the term "incidents" rather than "attributes." *Id.* at 96. However, courts have used a variety of terms to reference the concept. For clarity, I am using "attributes" as the *Gerber* decision did.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 97–99.

178. *Id.* at 96.

179. Gerber v. Hickman, 291 F.3d 617, 622–23 (9th Cir. 2002).

intimate association[180] and privacy.[181] The Court characterized intimate association and privacy as inherently inconsistent with incarceration and emphasized that incarceration is not the same as sterilization.[182] By narrowly construing the right to procreate in this way, the Court was able to conclude that the right to procreate was inconsistent with incarceration.[183] However, the analysis in *Gerber* overlooks many attributes of the right to procreate and misapplies these to the goals of incarceration. Below, I describe other attributes of the right to procreate and then analyze this full picture to determine the consistency with incarceration.

1. Attributes of the Right to Procreate

To fully identify the attributes of the right to procreate, it is helpful to first look back to *Skinner* to see what the Court believed this right protected. Then, we should reflect on current law to determine whether our current medical understanding would include any additional attributes. Although *Skinner* dealt with a case of medically intrusive and permanent sterilization used as a punishment for certain criminal convictions, the Court was addressing more broadly the government's power to make decisions about which individuals and groups could have children:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[184]

Although this passage is oriented around sterilization, as was the issue in *Skinner*, it also addresses the broader messages of anti-eugenics and individual liberty. Thus, *Skinner* can apply to temporary and permanent acts

180. Intimate association is used in the First Amendment right to association context. *Id.* at 621 ("Intimate association protects the kinds of relationships 'that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives . . . .'") (citing Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).

181. *Id.* at 621.

182. *Id.* at 621–22.

183. *Id.* at 623.

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

by the state that limit procreation by physically sterilizing a person or putting them into a situation where they cannot procreate.

For one, *Skinner* should be understood to apply to both governmental acts that biologically prevent procreation and acts that situationally prevent it. Despite not explicitly mentioning it, the case came at a time when the eugenics movement in Germany was receiving significant public attention.[185] The Court highlighted this in the passage above by mentioning the role procreation has in creating future generations and also noting how governmental intervention in procreation can have devastating effects on certain groups of people.[186]

The harms of preventing procreation arise regardless of the specific method the government uses. Sterilization procedures open a range of additional harms, such as privacy violations, issues with consent, and medical risks.[187] However, these additional harms should not be conflated with the goal of preventing governmental restrictions on a person's ability to procreate. Situational prevention of the right to procreate can occur when the state confines a person in a setting where the individual may retain their physical capabilities to procreate, but is denied access to reproductive material, necessary medical care, or the privacy and psychological environment necessary to procreate. While a person may still be able to procreate in theory, these types of state actions result in the same harm to the right to procreate as physical sterilization.

Second, the anti-eugenics messaging in *Skinner* should be understood to apply to both permanent and temporary governmental prohibitions on procreation. The anti-eugenics undertone is particularly important to remember when considering policing patterns and incarceration rates.[188] While a total and permanent restriction on procreation gives the government the greatest ability to limit certain people from having children, many temporary restrictions can still deprive a person of the right forever. For example, claiming that a person retains their right to procreate after release

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185. Michael J. Davis, Skinner v. Oklahoma*: How Two McAlester Lawyers Derailed Criminal Sterilization in America and the U.S. Supreme Court Invented 'Strict Scrutiny' as a Result*, OKLA. BAR J., May 2023, at 12, 15.

186. *Skinner*, 316 U.S. at 541–42.

187. *See supra* Part I.D. (discussing risks from deception and coercion).

188. *See, e.g.*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html (finding that Black Americans make up 41% of the prison population despite only being 14% of the overall population in the U.S.; there is an aging prison population; and "excessively long sentences" have kept people incarcerated; that the rates of incarceration of women is growing substantially faster than men's incarceration rates; that immigration is used to confine people in the criminal penal system and the immigration detention system; and that people with mental health conditions are more likely to be incarcerated).

from incarceration ignores that human biology creates a finite window for reproduction[189] and that the vast majority of people are incarcerated during periods of their typical childbearing ability.[190] Additionally, even short-term incarceration can restrict reproductive ability, especially with over-policing certain communities and impractical probation requirements resulting in frequent rearrest, and incarceration of any length creating biological and social impacts on a person.[191] Further, *Skinner* looked at a criminal statute that applied regardless of whether a person previously had children or what their reproductive ability was.[192] As such, *Skinner* prevents governmental intervention in an individual's ability to procreate regardless of whether they have children, how many children they have, or their current reproductive ability.

These readings of *Skinner* show the practical and social effects of the right to procreate. One of these effects is the ability to be free from governmental intervention that prevents a person from determining when to have children and how many children to have. If the state stops a person from procreating, the right to procreate has been violated regardless of whether someone already has children. Similarly, if the state previously prevented someone from having the freedom to procreate, but gives that freedom back later, the right has still been intruded on because the individual's choice in deciding when and how many children to have was previously revoked. Additionally, with *Skinner* serving as a response to limit the potential for eugenics, the right to procreate also provides individuals with the liberty to try to have genetic children.

Reflecting on the current understanding of the right to procreate, another attribute of this right is its place in fulfilling religious, personal, and familial roles. As addressed above, the right to procreate has been bundled with other

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189. *See generally* Mark V. Sauer, *Reproduction at an Advanced Maternal Age and Maternal Health*, 103 FERTILITY & STERILITY 1136 (2015) (addressing infertility and health risks to women with increasing age, disputing conceptions that technology has extended the age at which women can reproduce); Rakesh Sharma et al., *Effects of Increased Paternal Age on Sperm Quality, Reproductive Outcome and Associated Epigenetic Risks to Offspring*, 13 REPROD. BIOLOGY & ENDOCRINOLOGY, no. 35, 2015, at 1, 11 (discussing findings that increased age correlates with increased male infertility as well as reproductive risks that prospective parents may wish to consider).

190. Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AM. MED. ASS'N J. ETHICS 779, 779 (2013) ("The majority of women in prison and jail are in their reproductive years with a median age of 34.").

191. *See, e.g.*, Crystal M. Hayes et al., *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 110 AM. J. PUB. HEALTH S21, S22 (2020) ("Although jail stays may be short, current sentencing laws can keep women behind bars for a long time. Because a woman's fertility in general declines with age, this means that a woman who is released from prison after a lengthy sentence will have less fecundity than when she entered."); *see* Sawyer & Wagner, *supra* note 188 (finding that one in four people who go to jail will be arrested again within the same year).

192. *See* Skinner v. Oklahoma, 316 U.S. 535, 536–37 (1942).

family, privacy, and reproductive rights.[193] Part of the reason these rights have been bundled together is because of their importance in advancing marital and family relationships. However, the right to procreate on its own is still used to fulfill marital and family needs. Additionally, the right to procreate also serves a role in advancing the personal and religious fulfillment that can come from having children.

Beyond these attributes, the right to procreate may have additional practical and social impacts based on broader readings of the right. For example, if the right to procreate is determined to be a right afforded broad noninterference, then the right may also have implications for how ART is regulated and controlled. A positive right approach may also extend to medical care and ART, and work to eliminate social and political barriers to having children. However, there has not been confirmation by the courts or a general legal consensus that the right extends to such care. Therefore, the only attributes that must be considered when determining whether the right is not inconsistent with incarceration are: (1) the freedoms of an individual to have children when they want, (2) protections for trying to have genetic children, and (3) the right's role in religious, personal, and familial fulfillment.

2. Consistency with Incarceration

While there may be some aspects or methods of procreation that are considered inconsistent with incarceration, the right as a whole should not be dismissed as inherently inconsistent.[194] Even accepting the Court's statement in *Gerber* that "[t]he loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime,"[195] not all forms of intimate association are inconsistent with incarceration. For example, the Court in *Gerber* explained that intimate association protects "the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."[196] While there may be a legitimate penological interest related to curtailing cohabitation with family or the ability to make day-to-day decisions on how to raise a child, the right to marriage has been found to survive incarceration.[197] Therefore, like marriage, just because the right to procreate can be a part of the right to

193. *See supra* Part I.

194. *See* Turner v. Safley, 482 U.S. 78, 95 (1987) ("The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life.").

195. Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002).

196. *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)).

197. *See Turner*, 482 U.S. at 100.

intimate association does not mean that it is inherently inconsistent with incarceration.

Additionally, attributes of the right to procreate exist outside of intimate association. Procreation is not a single event that occurs in a single way. While sexual procreation necessarily involves close and sexual contact between people, other forms of procreation exist. For example, collecting reproductive material and then sending it outside of the prison, either for use now or later, does not involve close sexual contact. In the case of sperm collection, it can be done without close contact with any other person. Therefore, there are methods of procreation that escape the state's concern that procreation is inconsistent with incarceration's goals of isolation and the legitimate interest in preventing security issues resulting from contact visits.

First, it is important to note that pregnancy and childbirth do occur in prisons and jails.[198] Some constitutional rights may be inconsistent with incarceration, even when prisons allow limited access.[199] Still, the reality of pregnancy and childbirth while incarcerated helps show that pregnancy in prison is treated primarily as a medical condition rather than a social activity.[200]

Second, a person who collected their genetic material or created embryos before incarceration may have a genetic child conceived and born with virtually no involvement during incarceration. This avenue is rare due to costs associated with storing reproductive materials. However, it demonstrates another way that someone may have children while incarcerated. As a counter to equal protection arguments,[201] it is also valuable to note that through surrogacy, men and women could both have a genetic child with pre-collected reproductive materials and a child may even be born while a genetic parent is incarcerated despite no pregnancy occurring in prison.

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198. Susan Hatters Friedman et al., *The Realities of Pregnancy and Mothering while Incarcerated*, 52 J. AM. ACADEMY PSYCHIATRY & L. 365, 365 (2020) ("A Bureau of Justice report noted that four percent of women reported that they were pregnant at the time of admission to state prison, and three percent were pregnant at the time of admission to federal prison. Other reports have higher estimates of 5 to 10 percent being pregnant at reception.").

199. *See* Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) (finding conjugal visits inconsistent with incarceration even though the state prison system had a program to allow some family visits).

200. Despite the number of people who enter prisons and jails pregnant, most facilities lack the resources and programs to provide adequate care during pregnancy. My argument here is not to detract from the need to improve the care of pregnant people who are incarcerated. Rather, I intend to highlight how the existing structure views parts of procreation separate from intimate association.

201. *See* Goodwin v. Turner, 908 F.2d 1395, 1396–97 (8th Cir. 1990); Gerber v. Hickman, 264 F.3d 882, 891 (9th Cir. 2001), *rev'd en banc*, 291 F.3d 617 (9th Cir. 2002) (equal protection not discussed in *en banc* opinion).

Third, there may be reasons why a person wishes to collect their reproductive material while incarcerated to use post-confinement. In these cases, there is no pregnancy occurring at the moment nor is there any guarantee that the individual will ever attempt to use the reproductive material, but it may be the only way procreation is possible once released. These three examples show that some aspects of procreation can exist without countering the goals of incarceration, with some aspects currently occurring in prisons.

Other penological goals may suggest that procreation is inherently inconsistent with incarceration. However, this Part demonstrates that procreation is not an isolated act that can only occur in one way. As such, it is difficult to maintain that all methods are inherently inconsistent with incarceration. Similarly, there are many logistical considerations that could limit a prison's functioning—additional care for pregnancy and childbirth, costs for egg collection and fertility treatments, health and safety risks for pregnant people and their fetuses, concerns over privacy and coercion, and so forth. However, none of these potential technical reasons apply universally to all forms and aspects of procreation. Having some limitations on the right to procreate does not mean it is inconsistent with incarceration; therefore, the right to procreate survives incarceration.[202] Any prison restriction that burdens the right to procreate should be analyzed under the *Turner* factors to determine whether the restriction is constitutional.

B. Prong 2: Procreation as a Burdened Constitutional Right

A constitutional right that survives incarceration can be limited by the government in ways that would not be permitted in typical settings. However, the limitation may not be burdened beyond what is necessary based on the *Turner* factors.[203] Without a specific prison restriction in question, this Part proceeds by addressing each of the four *Turner* factors broadly based on common arguments, then concludes by identifying examples of restrictions that would be constitutional or not.

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202. *See* Kristen M. Davis, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Rights to Procreate*, 44 J. URBAN & CONTEMP. L. 163, 165–70 (1993) [hereinafter Kristen M. Davis] (providing a case law-based approach for finding the right to procreate survives incarceration).

203. *Gerber*, 291 F.3d at 622.

1. Relationship Between the Restriction and a Valid Governmental Interest?

The first factor of the *Turner* analysis looks to identify a legitimate governmental interest and then to whether the restriction is rationally related to that interest.[204] Below, I look at interests that have been proposed for restricting the right to procreate in prisons, both generally and in unique or new circumstances. For purposes of analysis, I grouped the asserted governmental interests across all types of restrictions into the broad categories of security, safety, punishment, equity, costs, and ethics. As technologies and beliefs adapt, it is possible for new interests to emerge, but these are intended to represent the main governmental interests that have previously been and currently are being argued.

a. Security

Prison security is one of the main governmental interests asserted to justify restrictions on procreation. There is no doubt that prison security is an important governmental interest in the current carceral system; beyond protecting prison property and workers, security can be necessary for protecting incarcerated people from unnecessary harm.[205] However, the right to procreate must actually pose a legitimate security risk to justify restricting it in prisons. Typically, security concerns arise from close contact between people and the movement of people and materials in and out of a prison.[206] Below, I further explain how these security risks are constructed across methods of procreation. I then look at whether restricting procreation advances the state's interest in promoting security.

The most widely acknowledged security risk related to procreation in prisons is close contact between incarcerated people.[207] For example, conjugal visits fall outside of protected rights while in prison.[208] This is partly due to concerns that prohibited items can be brought into the prison and easily transferred to an incarcerated person during contact visits.[209] These same security concerns are used to argue against incarcerated women accessing ARTs because it is necessary for a medical professional to make physical

204. Turner v. Safley, 482 U.S. 78, 89–90 (1987).
205. *Id.* at 91.
206. *See* Kristen M. Davis, *supra* note 202, at 172–73, 190.
207. *Id.* at 172.
208. Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994).
209. *Id.* at 191, 192 n.195.

contact with the person undergoing the procedure.[210] The same argument could also be made for preventing additional pregnancies in prisons, as pregnancy also increases the number of people required to make close contact with someone who is incarcerated.

However, broadly restricting close contact related to procreation is not always necessary to promote security. Some prison programs allow incarcerated people to have physical—and sometimes even private—contact with family members.[211] In these cases, restricting procreation does not prevent the possibility of close physical contact any more than is already possible.[212] Therefore, restricting the right to procreate cannot be justified by claiming that it prevents security risks associated with incarcerated people having close contact with others. However, many prisons do not have these programs, and in the ones that do, not every person incarcerated in the facility has access to them.[213]

In most prisons it may be easier to justify restricting the right to procreate with the interest of preventing close contact under the justification of security. However, not all close contact is the same. For example, the close contact required for sexual procreation is different than close contact between an incarcerated person and a medical professional conducting an ART procedure.[214] This distinction is important because the *nature of the contact* and the *type of relationship* underpinning the close contact are fundamentally distinct. Close contact with a medical professional is inevitable in prison. As such, there are already established procedures for screening medical professionals before they work in prison facilities, on top of existing professional rules that are enforced regardless of the setting. Similarly, any medical procedure can put a person in a vulnerable position or require revealing traditionally private locations on the body. Because of this, people working in reproductive health are trained to provide care in a way that minimizes a sexual connotation, and rather focus care on treating a person or medically assisting with reproduction.

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210. Richard Guidice Jr., *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 FORDHAM URB. L.J. 2277, 2307 (2002) (discussing deference to prisons for security interests).

211. *See* Hagan, *supra* note 122.

212. There may be other interests that are promoted by a restriction on procreation in these scenarios. These are likely to include safety, punishment, and health. However, these interests should be examined on their own, not as a part of security justifications.

213. *See* Hagan, *supra* note 122.

214. *See* SARA MATTHIESEN, REPRODUCTION RECONCEIVED: FAMILY MAKING AND THE LIMITS OF CHOICE AFTER ROE V. WADE 35 (Rickie Solinger et al. eds., 2021) ("In 1952, a woman incarcerated . . . became pregnant despite having been incarcerated for several years at the all-female institution . . . the woman admitted that during one of her finance's visits he slipped her a vial of his semen, with which she then inseminated herself using a syringe from the doctor's office.").

Additionally, the right to procreate creates a security risk because it involves people and things coming in and out of prisons. Most notably, childbearing requires a third party who is not a part of the prison system to come in. Further, sperm collection inside of prisons has been denied based on the argument that it necessarily involves items entering and leaving the prisons.[215] While many physical things come in and out of prison facilities, sperm is arguably different because it is something that an incarcerated person creates. Unlike a letter that an incarcerated person may write, sperm must be transported outside of the facility within a narrow timeframe, which limits thorough inspection.[216]

These same security concerns are also used to argue that incarcerated women should not have access to ARTs. For example, the potential of egg collection in prisons has been criticized because either an incarcerated person will have to be transported outside of the prison or medical professionals will have to come into it with specialized equipment.[217] Similarly, pregnancy can create a security risk[218] because it increases the chances an incarcerated person will need to be transported off-site for specialized care or to treat complications from childbirth. Additionally, pregnancy and childbirth within the prison facility ultimately results in more people coming into the prison, such as those tasked with caring for the child.

Like with preventing close contact, restricting people and things that are necessary for procreation from coming in and out of prisons does not always advance security interests. Although third parties entering a prison for sexual procreation can pose a wide array of potential risks, medical professionals and social workers do not pose the same security risks. Unlike third parties, individuals who are acting in a professional capacity are overseen by the prison system and are subject to certain standards and liability.[219]

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215. *See* Kristen M. Davis, *supra* note 202, at 190–92.

216. *Health Library: Sperm*, CLEVELAND CLINIC (July 25, 2024), https://my.clevelandclinic.org/health/body/sperm ("Sperm can live up to an hour outside your body in a room temperature environment—68 degrees Fahrenheit (20 degrees Celsius). Exposure to different temperatures can kill sperm quickly.").

217. *See* Goodwin v. Turner, 908 F.2d 1395, 1400 (8th Cir. 1990); Guidice, *supra* note 210, at 2308–09.

218. Beyond the additional medical care needed, which increases the close contact between the incarcerated person and medical and prison staff, pregnant people also need different security precautions, such as alternative restraints, in order to avoid harm to the individual or fetus. *See* CAROLYN SUFRIN, PREGNANCY AND POSTPARTUM CARE IN CORRECTIONAL FACILITIES 7 (2018) ("Usual security precautions that are applied to nonpregnant inmates, such as the use of restraints, pose risks for pregnant women.").

219. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-106404, MATERNAL HEALTH CARE IN STATE PRISONS AND LOCAL JAILS 34 (2024) [hereinafter *Maternal Health Care*] (finding that some prisons and jails allow doulas to assist pregnant incarcerated people but first require the doulas to undergo a screening process); FED. BUREAU PRISONS, U.S. DEPT. OF JUSTICE, NO. 3420.12, STANDARDS OF

Additionally, medical staff, social workers, and other professionals (e.g., teachers, lawyers, government officials) regularly enter prisons through established security mechanisms. These mechanisms could be used for any additional professionals who must enter the facility to preserve the right to procreate.

Similarly, items moving in and out of prisons can open up security concerns, but not all items should be treated the same. For example, specialized medical equipment that is coming in and out of a prison is unlikely to pose a large security risk because of its medical nature.[220] Transporting reproductive material outside of the prison is also unlikely to raise any security risks because the process—from the time of collection to transport out of the facility—happens quickly, reducing the number of people who can access it.[221] The actual material could be moved either by trained professionals who are held to professional standards or it can be moved by itself in small and clear containers. Additionally, while there are security risks associated with moving incarcerated people in and out of a prison facility to access ART procedures or to receive pregnancy care, these concerns can be mitigated in other ways and do not extend to all aspects and methods of procreation.[222]

Some security interests may be served by restricting the right to procreate, but any restriction must be more specific than an absolute prohibition. The main security risk that can be mitigated by restricting this right is the risk associated with third party individuals who are not associated with the prison entering the space. However, only sexual procreation

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EMPLOYEE CONDUCT 25–35 [hereinafter STANDARDS OF EMPLOYEE CONDUCT] (providing employee disciplinary actions for violations of employment standards, including those aimed at safety and security).

220. In addition to established procedures and policies aimed at ensuring prison employees create a safe and secure environment, *see generally* STANDARDS OF EMPLOYEE CONDUCT, *supra* note 219, many prisons have already created policies for increasing safety related to medical devices that incarcerated people have control over and use in their day-to-day activities, such as eyeglasses and breathing devices. *See* FED. BUREAU PRISONS, U.S. DEPT. OF JUSTICE, NO. 6031.05, PATIENT CARE 65–67 (2024). This is not to dismiss the increased safety and security risks of any medical care or device within carceral settings. *See* Jill Moore, *Public Health behind Bars: Health Care for Jail Inmates*, POPULAR GOV'T 16, 19 (2005) ("[M]edical equipment can become a weapon, or a health care provider can become a hostage."). However, contextualizing the risk shows that prisons already have policies to mitigate security risks related to medical devices and the people who use them.

221. *See Health Library: Sperm*, *supra* note 216 (discussing short timeframe and temperature range for sperm to live outside the body); Amin Sedaghat Herati, *Sperm Banking*, JOHNS HOPKINS MED. (last visited Dec. 14, 2025), https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/sperm-banking ("It's not possible to successfully freeze sperm at home. Sperm freezing needs to happen in a laboratory with the proper quality controls in place.").

222. For example, a prison could extend traditional screening procedures for medical staff to professionals working with reproductive treatments. *See Maternal Health Care*, *supra* note 219, at 34 (discussing screening for healthcare workers in prisons). Similarly, a prison may choose to permit only non-sexual methods of reproduction.

necessarily involves a third party entering the space, and in some scenarios, such as approved conjugal visits, the third party may already have access to the space. Therefore, restricting the right to procreate is only related to the state's security interests when sexual procreation is at issue. Outside of this, security should not be used as a justification for limiting this right.

b. Safety

Another state interest often given as a justification for limiting the right to procreate is the promotion of safety for both incarcerated people and people outside of prison who may be involved. Safety, broadly speaking, is of course a valid state interest. But like security, it must be related to the restriction on the right to procreate. Typically, safety concerns are framed in one of two ways: concerns for medical or pregnancy complications in prison and concerns that non-incarcerated people may be forced into creating or parenting a child.

The first approach to safety arguments focuses on safety for an incarcerated person who is undergoing a medical procedure related to an ART or becoming pregnant. This can involve fears that the prison setting cannot provide a proper environment for reproductive procedures as well as safety concerns for people who are recovering from childbirth or medical procedures. It should be emphasized that there is an inherent risk with all pregnancies and medical procedures. There is evidence of an increased risk associated with pregnancy while incarcerated, both to the pregnant person and the fetus.[223] Pregnancy-associated risks can come from the stress of incarceration, lack of proper care and nutrition, physical abuse originating from other incarcerated people or prison staff, and other similar factors.[224] This data is not simply theorized, but reflects real-world outcomes among people who were pregnant while incarcerated.[225]

To avoid these risks, an incarcerated person may collect their reproductive material for a spouse, partner, other intended parent, or surrogate who could then attempt to conceive. Alternatively, an incarcerated

223. *See generally* Am. Coll. Obstetricians & Gynecologists, *Reproductive Health Care for Incarcerated Pregnant, Postpartum, and Nonpregnant Individuals*, 138 OBSTETRICS & GYNECOLOGY e24 (July 2021); AZHAR GULAID & EVELYN F. MCCOY, REPRODUCTIVE HEALTH CARE IN CARCERAL FACILITIES 8–9 (2022).

224. *See* Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e28–e29; GULAID & MCCOY, *supra* note 223, at 8–9. Prisons should have a duty to address these issues—unfortunately, discussing this duty is beyond the scope of this Article—which would help to alleviate the potential risks to people who choose to become pregnant while incarcerated. Until then, the interest of protecting maternal and fetal health may continue to be asserted as a valid state interest, but prohibiting the right to all aspects of procreation is not related to this goal.

225. *See* Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e28–e31.

person may freeze their reproductive material so they can use it after being released. All these options avoid the increased risk of being pregnant in prison.

Those who procreate using ARTs are subject to varying levels of medical care and unique risks. The egg collection process is one of the most involved. It requires injections in the weeks leading up to the collection procedure, examination under anesthesia, and involves risks of complications, such as ovarian hyperstimulation syndrome.[226] However, only around 5% of patients who undergo ovarian stimulation today have some form of ovarian hyperstimulation syndrome,[227] and the risks of severe complications occur in only 0.1–2% of all patients.[228] Other complications from egg collection, such as those from anesthesia or medical mistakes, are rare and generally mild.[229] It is also important to note that the complications typically come from either existing conditions[230] or from medical mistakes,[231] not conditions related to incarceration.

Other areas of safety concerns, including the need for multiple injections and recovery from anesthesia, can be accomplished through existing procedures prisons have created for other medical conditions.[232] However, not all aspects of ARTs are extensive medical procedures like the egg collection process for IVF. While it is ideal for sperm collection to take place in a sterile environment, it is functionally a non-medical process that does not create any substantial risks. Similarly, in a situation where becoming pregnant in prison is deemed safe, intracervical insemination can be done with very little special equipment and poses few risks.[233] Similarly, intrauterine insemination, where an embryo is placed directly in the uterus,

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226. *See In Vitro Fertilization (IVF)*, *supra* note 6.

227. *Ovarian Hyperstimulation Syndrome (OHSS)*, CLEVELAND CLINIC (Dec. 5, 2023), https://my.clevelandclinic.org/health/diseases/17972-ovarian-hyperstimulation-syndrome-ohss.

228. Angel Petropanagos et al., *Social Egg Freezing: Risk, Benefits and Other Considerations*, 187 CANADIAN MED. ASS'N J. 666, 667 (2015).

229. *Freezing Embryos*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos (last visited Dec. 5, 2025).

230. Existing conditions that lead to complications include age, hyperstimulation, or sensitivity to anesthesia. *See supra* notes 227–29; NAT'L RSCH. COUNCIL, *Potential Risks Associated with Egg Retrieval*, *in* ASSESSING THE MEDICAL RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH: WORKSHOP REPORT 31, 34–37 (2007) (noting anesthesia and hyperstimulation risks).

231. One of the biggest risks—most unique to egg retrieval procedures due to the minimally invasive procedure conducted with a needle—is medical staff puncturing organs other than the ovaries, resulting in bleeding or potentially greater complications. *See* NAT'L RSCH. COUNCIL, *supra* note 230, at 32–33.

232. *See Maternal Health Care*, *supra* note 219, at 34 (discussing screening for healthcare workers in prisons).

233. Ginsburg & Walker, *supra* note 154.

is an outpatient procedure that allows the patient to leave almost directly after.[234] Even the embryo transfer portion of IVF is typically conducted in an outpatient setting with minimal equipment needed, and the patient can return to near normal activities shortly after.[235]

The second approach to safety arguments looks at safety for others involved in the process. Arguments for safety have included an interest in protecting people from being coerced into becoming pregnant, creating an embryo, or parenting a child. Fears of coercion are particularly emphasized when factoring in potentially abusive relationships. Financial and social harms can also arise from having an incarcerated parent who is typically unable to provide financial or parental support. While these concerns are legitimate, they are not unique to incarcerated people. Parenthood and children are commonly used as a tool of control in abusive relationships.[236] Likewise, there are many scenarios where a person parents on their own or with little support from their child's other parent.[237] Additionally, the risk of sexually transmitted infections (STIs) in prison has raised concerns about incarcerated people collecting their reproductive material for others to use. While these fears are valid given the increase in STIs and similar infections in prisons,[238] there are multiple ways to limit this risk. First, the incarcerated person can be tested for STIs and other infections prior to collecting genetic material or becoming pregnant. Second, reproductive material can be tested for most transmittible conditions before use. Additionally, sperm is typically "washed" before use to mitigate the risk of STIs.[239]

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234. *See Intrauterine Insemination*, MAYO CLINIC (Sept. 12, 2023), https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722 (discussing how the patient can return to normal activities shortly after the IUI procedure and listing infection, spotting, and multiple pregnancy as the risks).

235. *Embryo Transfer*, EMORY UNIV. SCH. OF MED., https://med.emory.edu/departments/gynecology-obstetrics/patient-care/patient-education/embryo-transfer/index.html (last visited Dec. 5, 2025) (stating "[t]he procedure takes about 15 minutes" and the risks include losing embryos and cramping).

236. Cris M. Sullivan et al., *The Use of Children as a Tactic of Intimate Partner Violence and its Impact on Survivors' Mental Health and Well-being Over Time*, 39 J. FAM. VIOLENCE 153, 153 (2024) ("It is not uncommon for abusive partners and ex-partners to use children they share with survivors as intermediaries of abuse."); Courtney Cross & Gillian Chadwick, *Parenting Under Siege: Reckoning with Coercive Control*, 57 U. CONN. L. REV. 729, 734 (2025) ("Coercive control is a campaign designed to destabilize a survivor's identity and sense of self—as such, survivors' identities as parents, typically mothers, are a common battleground.").

237. This can include single parenting by choice, a parent dying, parents being deported, parents losing custody rights, and many other possibilities.

238. *See* Anne C. Spaulding et al., *Prevalence and Management of Sexually Transmitted Infections in Correctional Settings: A Systematic Review*, 74 CLINICAL INFECTIOUS DISEASES S193, S193 (2022).

239. *See supra* text accompanying note 154.

Testing before collection should be a regular part of medical care for all people. However, the ability to test and treat reproductive material after collection transfers the burden of safety outside of the prison. Even if procreating while incarcerated creates unique safety concerns for non-incarcerated people involved, broadly prohibiting procreation does not address these issues. For example, many people enter incarceration pregnant or while someone is pregnant with their child.[240] Further, an incarcerated person who has previously collected their reproductive material may be able to have a child while currently incarcerated. Setting these issues aside, a large ban on procreation is, at best, loosely related to the goal of protecting non-incarcerated people's safety. There are many other approaches a state could take to address this concern, such as strengthening victim protection programs, limiting the right to procreate as part of sentencing when it is related to the conviction,[241] or creating some form of oversight and approval for specific types of procreation that involve other people.

Overall, the interest in promoting safety is only related to certain parts of procreation. Namely, risks associated with childbearing while incarcerated. Other often-cited safety concerns related to procreation overstate the level of risk or fail to demonstrate how limiting the right to procreate would actually advance safety.[242]

c. Punishment

As the Court in *Gerber* alluded to, limiting the right to procreate may advance the state's interest in punishing incarcerated people, which can deter crime and promote rehabilitation.[243] While the Court in *Gerber* addressed this argument in the analysis of the first prong,[244] it is important to address it by applying the *Turner* factors too. Others may believe the right to procreate survives incarceration, but that limiting procreation can be an effective way to advance the state's goal of punishment. The general argument is that prison, as a form of physical isolation, is intended to be a punishment that separates incarcerated people from their families and society.[245] It is hard to

240. *See* Friedman et al., *supra* note 198, at 365–66.

241. This could create a new set of issues; however, it would at least create recognition of the way incarceration is limiting the right to procreate.

242. As discussed earlier in this Section, procedures such as egg and sperm collection or the various methods of artificial insemination have fairly low risks.

243. Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002) ("Our conclusion that the right to procreate is inconsistent with incarceration . . . is a conclusion that stems from consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation.").

244. *Id.* at 621–22.

245. *See id.*; Hernandez v. Coughlin, 18 F.3d 133, 136–37 (2d Cir. 1994).

deny that our modern prison system is not intended to punish; however, there are many ways to punish someone that do not involve stripping away a fundamental right.

First, if a state restricts the right to procreate in prisons as a means to punish—even if just part of the sentencing—this should be viewed more like a criminal sterilization statute rather than a decision about prison policies. *Turner* only applies when determining whether a fundamental right can be constitutionally limited within the prison system, not for analyzing criminal sentences and punishments.[246] Consequently, sentencing restrictions are outside the scope of the *Turner* test; instead, these restrictions should receive strict scrutiny under the traditional fundamental rights analysis.[247] Although states are not currently sentencing people under mandatory sterilization statutes, similar concerns can arise from state practices such as state-wide restrictions on procreation in prisons, uniform prison policies that prohibit all forms of procreation, or sentencing patterns that correlate with reproductive age.[248] Since states are rarely open about their intent to use prisons to restrict procreation, even bad intentions arguably are prevented by *Turner* instead. Regardless, it is unlikely that restrictions on procreation are related to the state's interest in using prisons to punish.

The right to procreate should not be restricted simply as a means of punishment for three main reasons. First, physical separation as a part of incarceration may limit contact with family members,[249] but it does not mean that one legally loses their family or their right to associate with them in non-

246. *See* Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1346–50 (2023) (evaluating the *Turner* test as a standard for protecting rights in sentencing but noting a downside is that "it does not easily translate to the non-carceral setting").

247. The Supreme Court has not directly explained the level of scrutiny applicable when limiting a fundamental right as part of a criminal sentence. On one hand, the Court has noted that "person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Chapman v. United States*, 500 U.S. 453, 465 (1991). On the other, a criminal sentence which restricts a person's right to procreate is the exact matter that was found unconstitutional in *Skinner* based on fundamental rights grounds. *Skinner v. Oklahoma*, 316 U.S. 535, 537–41 (1942). The call to apply strict scrutiny to sentencing is not a new concept, nor is it an impossible task to so. *See* Salili Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 Yale L.J. 2112, 2134–58 (2020) (discussing advocacy in favor of applying strict scrutiny to sentencing, then explaining how strict scrutiny could be applied to sentencing under various theories of criminal punishment).

248. These are methods I propose as an attempt to identify and track functional sterilizations and/or temporary limits of the right to procreate. There are likely other effective methods or data points as well.

249. *Gerber*, 291 F.3d at 621 ("A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children.").

physical ways.[250] There are many people who are incarcerated and have some form of relationship with their children or are able to form a relationship after being released. The state should not use restrictions on the right to have a family or on preserving the possibility of having children in the future as a form of punishment. Second, even assuming that physical isolation is necessary as punishment, it can still be possible to accommodate the right to procreate by permitting non-sexual forms of procreation. Blocking all forms of procreation goes beyond a state's interest in punishment by physical separation. Third, not everyone is capable of procreating, nor does everyone want to. Restricting a right that only some people can and want to exercise is not an effective way to further an interest in punishment. There is not a clear relationship between restricting the right to procreate and the state's goal of punishment; there are alternative ways the interest in punishment could be accomplished more effectively.

d. Equity

In *Goodwin*, the Court explicitly mentioned sex equity as a reason to limit all people's access to ARTs.[251] In a dissenting opinion, Judge McMillian explained that providing an incarcerated person with a cup and space to collect his sperm would not cost or burden the prison much.[252] However, the court feared women would use the state's prison equity policy to demand that prisons accommodate either expensive ART procedures or pregnancy while incarcerated.[253] Similarly, there have been concerns that people sentenced to death would assert their right to procreate.[254] While collecting sperm could easily accommodate the right without much interference in the prison, having to accommodate a pregnancy has the potential to delay a scheduled execution.[255]

As demonstrated by federal constitutional requirements and the state prison guidelines in *Goodwin*, sex equity is a legitimate interest that a prison can assert.[256] Yet this argument fails to acknowledge biological differences that require different treatment. Although the *en banc* decision in *Gerber* did

250. COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 643–49 (13th ed. 2020) (explaining the First Amendment protections incarcerated people have for communicating with those who are outside of the prison, including family, friends, and the general public).

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

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

253. *Id.* at 1400 (noting that the court did not decide on constitutional grounds but rather on the Missouri Prison Bureau's policy which required roughly equal treatment between men and women's prison conditions).

254. Kristen J. Davis, *supra* note 202, at 188–92, 190 n.179.

255. *Id.* at 190 n.179.

256. *Goodwin*, 908 F.2d at 1399–40.

not address the equal protection claim, the overturned initial Ninth Circuit decision recognized that, because the sexes are not similarly situated in regard to procreation, there was no equal protection violation.[257] As Judge McMillan explained in the dissent of *Goodwin*, "equal treatment of inmates is not a legitimate interest when it is accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right."[258] A concern that men and women will not have access to the same things should not be used to deny everyone the right altogether.

e. Costs

Operating on a limited budget, states have an interest in reducing the costs associated with prisons. While sexual procreation may only marginally increase costs associated with extra security and space, it is no secret that ARTs can be expensive.[259] But even ART costs can vary quite substantially, with techniques such as collecting sperm being relatively cheap compared to a complete IVF process.[260] Further, there is no obligation for a prison to cover every possible procedure of every type of ART. For example, collecting reproductive material in the prison's health clinic necessarily involves spending money on staffing and supplies. But accommodating these costs does not mean that the prison must also pay for freezing the reproductive material, storage fees, or costs associated with subsequent use of the material. Additionally, the person choosing to participate in the process could pay for certain costs, reducing the burden on the prison.[261] While this would cause

257. Gerber v. Hickman, 264 F.3d 882, 891 (9th Cir. 2001), *rev'd en banc*, 291 F.3d 617 (9th Cir. 2002).

258. *Goodwin*, 908 F.2d at 1405 (McMillan, J., dissenting).

259. *See* U.S. DEPT. HEALTH & HUM. SERVS., FACT SHEET: IN VITRO FERTILIZATION (IVF) USE ACROSS THE UNITED STATES (2024) (finding the average cost for IVF "can easily exceed $40,000").

260. *See id.*; *Sperm Banking*, PENN MEDICINE, https://www.pennmedicine.org/treatments/sperm-banking (last visited Dec. 5, 2025) ("Sperm banking is less expensive than other fertility preservation methods."); *Donor Sperm*, COLUMBIA UNIV. FERTILITY CTR., https://www.columbiadoctors.org/specialties/obstetrics-gynecology/our-services/columbia-university-fertility-center/our-services/third-party-reproduction/donor-sperm (last visited Dec. 5, 2025) (stating that vials for sperm cost between $400 to $1,000, the intake fee for sperm is $150 per shipment, and storage for sperm is approximately $45 a month).

261. For example, in *Goodwin*, Judge McMillian explained in a dissenting opinion that:

> Goodwin's right to procreation can be accommodated at a negligible cost to prison security, administration, and allocation of resources. In order to accommodate Goodwin's right, all the Bureau needs to do is provide Goodwin with a clean container in which to deposit his semen and allow the container to be given to his wife. The container need not be sterile, and Goodwin has repeatedly offered to pay whatever minimal expenses are incurred. Any impact in accommodating Goodwin's right is obviously *de minimis*.

Goodwin, 908 F.2d at 1406 (McMillan, J., dissenting).

an access issue by limiting procreation only to those who have money, prisons have not let economic inequalities stop them from allowing different access to rights. For example, many prisons charge for phone calls, emails, and letter-writing materials; all of which are necessary for expressing First Amendment rights to communicate with those outside the prison.[262] Although communication materials are much cheaper than most ART processes, and can often be bought with money earned from prison jobs, economic inequalities to access are not an established reason to prohibit a constitutional right for everyone. Work should be done to lessen this gap, but it must extend beyond prisons to expand access for everyone.

Similarly, costs of pregnancy can be high when factoring in medical care, special diets, and institutional changes to accommodate a pregnant person in the prison setting.[263] However, prisons cannot discard a constitutional right simply because of costs.[264] Over time, prisons can learn how to minimize these costs or share them with government agencies that otherwise would be covering them.[265] Additionally, the costs associated with pregnancy would only be shifted to the government for the people who are incarcerated while pregnant—this excludes most men as well as women who use a surrogate or choose to freeze their reproductive material. It does not further the interest of reducing costs to prevent all methods of procreation just because pregnancy is expensive.

f. Ethics

The last major area of concern is the ethical implications related to procreating while incarcerated. Regardless of their current behavior, prison officials *should* have an unofficial interest in acting ethically and promoting ethical actions within the prison system. However, ethical arguments against

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262. *See* Daniel Webster, *The Cost of Communication: How Jails and Prisons Charge Incarcerated Persons for Phone Use*, GEO. J. POVERTY L. & POL'Y (Jan. 18, 2024), https://www.law.georgetown.edu/poverty-journal/blog/the-cost-of-communication-how-jails-and-prisons-charge-incarcerated-persons-for-phone-use/; Tiana Herring, *For The Poorest People in Prison, It's a Struggle to Access Even Basic Necessities*, PRISON POL'Y INITIATIVE BLOG (Nov. 18, 2021) https://www.prisonpolicy.org/blog/2021/11/18/indigence/ (noting mailing costs, email fees, and other communication charges).

263. *See Goodwin*, 908 F.2d at 1400 (discussing how accommodating pregnancy would be a cost burden on prisons).

264. *See* Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341–43 (3d. Cir. 1987) (holding that limited resources cannot justify a prison denying an incarcerated person access to an abortion).

265. *See* Friedman et al., *supra* note 198, at 368 ("The MBU cost is estimated at $24,000 per infant per year of prison nursery; the annual cost of a child in foster care was similar at approximately $22,000 per year.").

the right to procreate can sometimes fail to advocate for a truly ethical stance or fail to make a rational connection between the ethical principle and the restriction. Additionally, without clearly agreed-upon moral principles, interests rooted in ethics may not constitute "legitimate" governmental interests under the *Turner* test.[266] Setting this aside, I look at some of the main ethical arguments related to procreation, including concerns over who should have genetic children, potential harms children can face by having an incarcerated parent, and ethical worries over pregnancy in prisons.

On an extreme end, ethical arguments can claim it is morally wrong to allow certain bad people to pass on their genetics, and therefore, the state has an interest in preventing criminals from having genetic children, at least while in prison. Notably, there is actual disagreement on whether it is morally right to prevent some people from having kids.[267] Additionally, an ethical argument like this runs into eugenics-based ideas that *Skinner* functionally countered.[268]

Even if this were a legitimate interest that could be promoted, restricting all people in prison from having children most likely harms more than just the *bad people*. Some people are wrongfully convicted and then incarcerated for years before possibly being exonerated. Even if it is morally right to stop some people from having children based on their past acts, some *bad* people may be released from prison and still able to procreate, while other *good* people will be unable to do so. Not only is it hard to argue that preventing incarcerated people from having children promotes an ethical interest related to eugenics, but a restriction can hardly be related to promoting an ethical interest either.

Along the same lines, some people express ethical worries over the situation a child would be born into. Children can face stigmas related to their parents' incarceration, which can be exacerbated if they grow up with only one parent able to provide economic and emotional support.[269] Putting aside whether this is a legitimate ethical interest, preventing all procreation is not rationally related to preventing these stigmas. First, an incarcerated person

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266. Even ethicists cannot agree on which moral philosophy supports the government's role in procreation or parenthood. *See generally* Elizabeth Brake & Joseph Millum, *Parenthood and Procreation*, STAN. ENCYC. OF PHIL. (Oct. 27, 2025), https://plato.stanford.edu/entries/parenthood/ (describing debates in moral philosophy about access to parenthood and procreation); *see also* Karen A. Jordan, *The Emerging Use of a Balancing Approach in Casey's Undue Burden Analysis*, 18 U. PA. J. CONST. L. 657, 661–87 (2015) (providing an overview of the undue burden test and the role of "legitimate state interests").

267. *See generally* Brake & Millum, *supra* note 266.

268. *See supra* Part III.A.1.

269. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. J. 11, 11 (2017) (describing the effects of parental incarceration on children).

may not be having a child while in prison but may be taking steps to help preserve the possibility of having a child by freezing their genetic material. This would thereby avoid concerns related to children having a currently incarcerated parent.

A related ethical concern involves the social harms a child could face for having a previously incarcerated parent. However, this premise is overbroad. Individuals may be seen positively by community members for the action that resulted in conviction, might later be found innocent, or the prior prison sentence may not be discussed in the community. This also ignores that many children have a parent who was sent to prison after they were born or a parent who gave birth to them in prison,[270] meaning that the stigma of having an incarcerated parent will always exist. Restricting incarcerated people from procreating may make this perception worse.

Further, even if a child is born while their parent is incarcerated, modern family structures are increasingly diverse.[271] This makes it hard to claim real ethical concerns about stigmas related to single-parent households or a child's emotional harm from being raised without knowing their genetic parent. Even if a parent is never released from prison, recent changes in social norms around families[272] make it hard to argue that it would have been better for the child never to be born than to be born to a genetic parent with whom they may never have a close relationship with. More plausibly, some people are in prison because they are violent, or are non-violent individuals who have picked up bad habits or dangerous connections while in prison.[273] It certainly seems morally right to want to protect a child from being born into a harmful parent-child relationship, yet restricting procreation broadly is not related to this goal. With this logic, incarceration alone would justify permanent termination of parental rights, which is an overbroad position that

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270. *See supra* Part III.

271. *See* Daniel R. Meyer et al., *Increases in Shared Custody After Divorce in the United States*, 36 DEMOGRAPHIC RSCH. 1137, 1147–57 (2022) (examining demographic data for divorced parents and children living in shared-custody arrangements); *A Portrait of Stepfamilies*, PEW RSCH. CTR. (Jan. 13, 2011), https://www.pewresearch.org/social-trends/2011/01/13/a-portrait-of-stepfamilies/ (looking at the number of children raised with step-parents involved in their family structures); Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents Has Dropped since 1968*, U.S. CENSUS BUREAU (Apr. 12, 2021), https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html (finding that the number of two-parent families has decreased).

272. These norms include those that have emerged with donated reproductive material, single- and same-sex parenting, adoption, and normalization of extended family members serving as a parent.

273. Christopher Ingraham, *Even Violent Crime Victims Say Our Prisons are Making Crime Worse*, WASH. POST (Aug. 5, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse/ ("52 percent of victims said that prison makes people *more* likely to commit crimes again.").

is not based on individualized circumstances.[274] Similarly, preventing procreation on the ground that incarceration makes someone a risk to a child is not rationally related to protecting children's well-being. Instead, despite their flaws, there are systems in place to ensure the safety of all children.[275] Additionally, prisons could create screening mechanisms to make sure that a person is not trying to procreate for reasons that would raise red flags as harmful to a child such as an interest in having children solely as a means for economic support or having children shortly after a conviction of child neglect or abuse.

Another line of ethical interests is reducing the amount of people in prisons who are undergoing pregnancy, childbirth, and recovery from medical procedures. There is extensive evidence documenting the poor conditions in prisons, especially for people who are pregnant, new parents, or managing other medical conditions such as substance abuse or STIs.[276] It may be reasonable to prevent people from being exposed to these harms, but that goal can be achieved in many other ways that do not also restrict the right to procreate. Reducing these harms directly would help protect a broader group, including those whose pregnancies or medical conditions cannot be avoided. Further, reducing these harms would prevent emotional and social harms that result from having the right to procreate restricted. As it stands, poor prison conditions are part of a cycle that causes harm and creates stigmas that impact procreation and beyond. However, preventing some forms of harm by restricting the right to procreate ultimately creates new personal, relational, and social harms from having the right taken away, while also furthering harmful ideas about who can be a good parent.

g. Conclusion on Penological Interests

As seen above, many of the interests may be legitimate penological interests, but very few of them are *truly* rationally related to a broad

274. *See* Richard Hines-Norwood, *After Prison, I Became a Better Dad*, MARSHALL PROJECT (June 13, 2019), https://www.themarshallproject.org/2019/06/13/after-prison-i-became-a-better-dad; Peggy C. Giordano et al., *Parenthood and Crime: The Role of Wantedness, Relationships with Partners, and SES*, 39 J. CRIM. JUST. 405 (2013) (finding parenthood can reduce recidivism rates in certain circumstances).

275. These include traditional child protective services within state level departments of children and family services. Additionally, these include public education systems, community-based support for parents, and social welfare programs like WIC which are designed to promote access to education and basic needs for children regardless of income. *See* EARLY CHILDHOOD POLICIES AND PROGRAMS THROUGH A COMMUNITY LENS, HARV. GRADUATE SCH. ED. (n.d.), https://csc.developingchild.harvard.edu/child-policy-and-programs/ (accessible by visiting the website, scrolling to bottom, and clicking "Download a PDF about Child Policy and Programs").

276. *See* Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e26–e31.

restriction on procreation. Rather, a few interests may be rationally related to a restriction on specific types or aspects of procreation. Notably, sexual reproduction is the most vulnerable, because it based on existing precedent for both procreation and ideas related to isolation. Similarly, there may be reasons that restrictions on pregnancy could be found to be rationally related to goals such as safety. Many potential restrictions are not rationally related to any one interest, yet, these interest can generally be lumped together into a general interest in "efficient prison functioning." In the following Parts, I look at aspects and methods of non-sexual procreation under the remaining *Turner* factors.

2. Alternative Means of Exercising the Right?

The next *Turner* factor examines whether there is any other way to exercise the fundamental right when the restriction is in place.[277] In the case of procreation, the *Gerber* court claimed that individuals retain their right to procreate after being released from incarceration.[278] This is a vast overstatement and misunderstanding of the ability to procreate.[279] On one hand, there are a number of people who die while incarcerated.[280] Effectively, the right to procreate is stripped from individuals at the moment of incarceration. On the other hand, most people do get out of prison,[281] but many get out after their peak reproductive years.[282] This can effectively prevent procreation even after release. Additionally, data shows that most people who are incarcerated for long periods of time were imprisoned young, often around the age when people commonly have children.[283] When individuals are incarcerated from the time they would start having children through the time when they are most likely to successfully conceive and give birth, incarceration prevents any other way to exercise their right to procreate.

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

278. Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002).

279. *Id.*

280. *See generally* BUREAU JUST. STAT., U.S. DEP'T JUST., NCJ 300953, MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2019 – STATISTICAL TABLES (2021).

281. *See* ASHLEY NELLIS, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE SENTENCES 4 (2021) ("One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people.").

282. *See* Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/ (stating "the U.S. median age rose to a high of 38.9 years"); Lauren Porter et al., *How the U.S. Prison Boom has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30, 33 (2016) (finding the median age of an incarcerated person in the U.S. prison has been increasing over time, in part due to cycles of recidivism).

283. *See supra* Part II.A.

Further, it would be inconsistent with the application of other rights to claim that exercising the right to procreate after release from prison is a true alternative way to exercise it. For example, incarceration does not permanently deprive individuals of their right to free speech and expression. Despite this, there are still protections for forms of free speech in prisons. Similarly, the right to marriage is protected during incarceration regardless of the fact that a possibility to exercise the right exists once released from prison.[284] Like these rights, allowing individuals to exercise the right to procreate only after release is not an acceptable alternative to being able to exercise that right at a time of their choosing.

Importantly, procreation can be restricted during different parts of the process. For example, prohibiting only sexual procreation does not inherently restrict non-sexual procreation through ARTs. Additionally, restricting only certain aspects of procreation, such as pregnancy, does not completely eliminate alternative means of exercising the right to procreate. Of course, these are not perfect solutions, because the more restrictions there are, the fewer people will be able to freely participate in them due to costs, biology, connections outside of prison, and criminal sentences. Considering who can access the right to procreate through alternative means is important to keep in mind when weighing restrictions that leave narrow alternatives open.

3. Impact of Accommodating the Right?

The third *Turner* factor examines the impact that accommodating the right to procreate would have on prisons.[285] If this right could be widely accommodated—allowing for sexual procreation and providing access to ARTs for non-sexual procreation—there is potential for significant impacts on prisons. Most notably would be the costs associated with paying for treatments, caring for more pregnant prisoners, covering additional staffing needs related to security, and administrative costs from creating and managing programs that give access to the right to procreate. However, limiting access to this right can reduce some of the financial impacts. For example, methods of procreation that create high security risks, such as ones involving a third party coming into the prison, do not have to be accommodated. Similarly, high-cost procedures or methods could be made available but have the individual bear the costs of the procedure. When it comes to costs associated with pregnancy, states or individual prisons could take this as an opportunity to create dedicated procedures and areas for

284. *See supra* Part II.A.

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

childbearing. This could improve treatment overall and help to reduce costs compared to ad hoc accommodations for the occasional pregnant person.

Accommodating the right to procreate may create impacts outside of the prison system as well.[286] Many of these impacts were discussed in the interests Part above, such as ethical concerns about impacts on children born to incarcerated parents, potential for procreation to be used as a means of abuse or control, or the logistics of ART procedures being completed partially within prisons and partially outside of them.[287] However, the potential impacts to third parties and entities are often exaggerated or can be addressed by existing structures.

Notably, accommodating an unrestricted right to procreate may be very burdensome to prisons, but accommodating parts of this right can have a small impact. The level of impact can also vary from facility to facility or state to state. For example, a prison system with a program for incarcerated people who are pregnant or new parents may be less affected by a potential increase in pregnancies and parents. Likewise, a prison that allows conjugal or private visits may not have a large impact caused by security needs related to sexual procreation.

4. Ready Alternatives to Affording the Right?

The last *Turner* factor considers if there are other ways the prison could provide access to the right.[288] Determining the exact alternatives requires knowing the specifics of the restriction. For example, prisons that prohibit all forms of procreation do not leave any avenue for exercising the right. However, a prison that restricts the right to sexually procreate could still accommodate the right to procreate by offering access to non-sexual means of procreation. Many of these alternatives were discussed above,[289] but these only apply when prisons do not have a blanket ban on the right to procreate.

When there are ready alternatives for affording the right, prisons can easily justify a particular restriction because it does not constitute an overall ban on the right. Alternatives need not offer the same level of access to the right, meaning that a restriction preserving a right under specific circumstances is still favored over an outright ban.[290] On the other hand, the lack of any alternative means to affording the right should direct attention

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286. Percy v. State Dept. of Corr., 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div. 1995) (stating that "[o]f course, social and economic concerns beyond the prison walls could also be considered" when determining if a prison must accommodate incarcerated people participating in artificial insemination).

287. *See supra* Part III.B.1.

288. *Turner*, 482 U.S. at 90.

289. *See supra* Part III.

290. *Turner*, 482 U.S. at 78.

back to the interest that the prison claims the restriction advances. A restriction that prevents exercise of the right more than necessary to achieve the asserted interest should be further investigated to determine if there really is a need for such a far-reaching restriction. For example, a complete ban on all procreation likely burdens the right more than is necessary to achieve any legitimate state interest. Although a restriction on a fundamental right in prison does not have to be narrowly tailored, this should raise a red flag for a court to examine any alternative means to exercising the right and the impacts accommodating the right would create. Further, a restriction that allows some incarcerated people to exercise the right, but prevents others from exercising it, should be held to the same analysis to determine if the restriction unconstitutionally burdens particular groups.

C. What the Turner *Test Tells Us*

The right to procreate is not inherently at odds with the goals of incarceration. As such, an individual still has constitutional protections for their right to procreate even when incarcerated. While strict scrutiny would normally apply to restrictions on fundamental rights, the prison setting uses the *Turner* test to balance factors related to the ability to exercise the right with the government's interest in operating prisons. When looking at potential interests and the restrictions that may be used to advance the interest, it is clear that a broad restriction on procreation goes beyond what should be constitutionally permitted. Generally, restricting the right for sexual procreation in prison is easy to justify, as it is clearly rationally related to many legitimate goals of prisons facilities. It also does not completely foreclose other non-sexual means of procreation. The constitutionality of restrictions on non-sexual procreation will be more dependent on the individual circumstances of the particular prison. Although allowing forms of non-sexual procreation does not clearly harm any legitimate prison interest, maintaining access to methods of non-sexual procreation helps to keep the right to procreate in prisons available, at least in some form. Some forms of non-sexual procreation may burden the prison system more than others, especially from related costs. However, not all aspects or forms of ART have high costs, and regardless, some costs may fall beyond the prison's reasonability.

The right to procreate has been recognized as a fundamental constitutional right for nearly eight decades;[291] however, it has been functionally prohibited for people who are incarcerated. Compared to

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

grouping this right with other family and privacy rights, examining it as a distinct and independent right shows it was intended to protect an individual's freedom to bear children without governmental influence. While incarceration will add some form of governmental influence to every decision, the right to procreate protects against more than just forced sterilization. Restrictions on procreation in prisons can harm the right during incarceration and can also effectively prevent this right from ever being exercised when incarceration occurs during a person's reproductive age. As such, ARTs have a vital role in reconciling the tension between the right to procreate and countervailing governmental interests. Like all fundamental rights, the right to procreate does not offer a special right just in prisons. The relationship between ARTs and the right to procreate also extends beyond prisons.

IV. APPLICATION TO PROCREATION BEYOND PRISONS

Reproductive rights have been at the forefront of political and social debate for decades. However, in a post-*Dobbs* world where fetal personhood laws are quickly expanding to prevent access to ARTs,[292] the negative right or noninterference in the right to procreate is now at risk. Looking at the right to procreate in the prison context ultimately can advance the right outside prisons too. The first way it does this is by separating the right to procreate from other reproductive and family rights.[293] Unlike how reproductive and family rights have been bundled together, these rights have remained largely separate within the prison setting. This allows us to see how a right can stand on its own and compare it to other rights it is often grouped with. Next, the prison setting also provides an example of how to interpret and apply the right to procreate to determine the extent of what it protects. As addressed above, fundamental rights are easier to restrict in prison compared to other settings.[294] However, the right to procreate in prisons shows us that it not only applies to non-sexual procreation, but should also extend to ARTs.

Below, I first look at how the right to procreate can be separated from other rights and explain why this is useful. I then turn to how the right to procreate should be understood, using the prison context to explain the minimum scope of the right. Lastly, I look at how this construction of the right to procreate can help protect access to ARTs when challenged by state interests in protecting potential life.

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292. *See* sources cited *supra* note 7.
293. *See supra* Part I.C.
294. *See Turner*, 482 U.S. at 89–90; *supra* Part II.A.

A. The Right to Procreate as a Constitutional Reproductive Right

As discussed above, the right to procreate has an over eighty-year history as a recognized constitutional right, pre-dating other major reproductive and privacy rights.[295] However, the right to procreate was quickly bundled together with rights stretching across abortion, contraception, marital privacy, and parental control.[296] It was rare to see any court discuss one area of reproductive rights without touching on another. The right to procreate from *Skinner* was cited in the decision for extending the right to contraceptives to unmarried people,[297] just as contraceptive rights from *Eisenstadt* were cited in the decision granting same-sex marriage rights.[298] In instances like these, rights rarely build directly on one another. Rather, the Court used these rights to construct the idea of privacy and autonomy within family and reproductive matters. As rights in the sphere of family and reproductive privacy were questioned and developed, the Court leaned into other existing rights in these areas, further bundling the rights together.

For about half a century, the bundle of rights was an effective way to argue for noninterference in matters of reproductive and family decisions.[299] When a right in one area of reproductive decision-making and family privacy was strengthened, the entire sphere of privacy and the corresponding bundle of rights would benefit.[300] However, *Dobbs* substantially changed this. Now

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295. *See supra* Part II.A.; cases cited *supra* notes 10–11.

296. *See* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (grouping the right to procreate into privacy rights); Zablocki v. Redhail, 434 U.S. 374, 385 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977); Roe v. Wade, 410 U.S. 113, 152–54 (1973); Bellotti v. Baird, 443 U.S. 622, 639–40 (1979); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 426–27 (1983); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 771 (1986); Hodgson v. Minnesota, 497 U.S. 417, 434 (1990); Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992).

297. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972).

298. Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

299. *See Roe*, 410 U.S. at 152 (using case law that established a right to privacy for other issues to find a right to privacy extending to abortion); *Bellotti*, 443 U.S. at 639–40 (relying on established privacy and abortion rights cases to rule in favor of access to abortion for minors); *City of Akron*, 462 U.S. at 426–27 (citing broad family and privacy rights to set the grounds for affirming a Court of Appeals ruling that invalidated a number of abortion restrictions); *Thornburgh*, 476 U.S. at 772 (citing cases that have developed a "private sphere of individual liberty [that] will be kept largely beyond the reach of government" as support for invalidating a state's abortion restrictions); *Hodgson*, 497 U.S. at 434 (relying on a number of abortion, contraception, and procreation cases to invalidate a two-parent notification requirement for minors to receive abortion care); *Casey*, 505 U.S. at 847–48 (citing a number of cases establishing family and privacy rights to invalidate a law requiring that a woman notify her husband before receiving an abortion). Of course, the family and reproductive privacy rights were not a perfect solution even before their dismantling by *Dobbs*. However, they functioned as a recognized bundle of rights that was rooted in our Constitution.

300. *See, e.g.*, *Obergefell*, 576 U.S. at 664–69 (strengthening the right to marriage by relying on precedent in sexual freedoms, contraception, and family privacy).

that *Dobbs* has opened up one area of reproductive privacy and autonomy, states want to do the same for other areas, particularly when they can operate under the guise of protecting children.[301] While some will argue that *Dobbs* was a narrow decision that only overturned an erroneously founded fundamental right to abortion,[302] *Dobbs* has clearly been used both explicitly and implicitly to chip away at other reproductive and family rights.[303] These impacts are evident across reproductive and family rights, but access to IVF and other ARTs has taken center stage in many anti-abortion states.[304] Two distinct but related rationales underlie the attack on these rights.

1. Creating a Window into Reproductive and Family Privacy

The first rationale for chipping away at reproductive and family rights views *Dobbs* as creating a window into a private enclosure created by the rights. In this approach, the combination of reproductive and family rights helps to build an enclosure that the state cannot see into without special approval, which is essentially what a house does for Fourth Amendment protections. There have always been small peepholes for the state to see into the private space, such as to protect viable fetal life[305] or to intervene into

301. Beyond limiting abortion and extending fetal personhood to embryos outside of the human body, this logic has also been used to limit parental rights related to providing gender-affirming care to minors. *See* L.W. v. Skrmetti, 83 F.4th 460, 475–78 (6th Cir. 2023) (discussing how parental rights can be limited to "protect" a child from a parent who allows the child to access gender-affirming care); Mary Anne Pazanowski, *Parents' Rights Take Focus in Oklahoma Trans Care Ban Arguments*, BLOOMBERG L. (Jan. 17, 2024), https://news.bloomberglaw.com/litigation/parents-rights-take-focus-in-oklahoma-trans-care-ban-arguments.

302. *See Emma Waters on the Alabama IVF Ruling*, CSPAN (Mar. 3, 2024), https://www.c-span.org/video/?533973-5/emma-waters-alabama-ivf-ruling.

303. *See* sources cited *supra* notes 3–4; LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

304. *See* sources cited *supra* notes 3–4, 6–7; LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

305. *See* Roe v. Wade, 410 U.S. 113, 156–64 (1973) (discussing the balance with a state's interest in protecting unborn or potential life); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 443–49 (1983) (clarifying that while the Court is overturning state abortion regulations in this case, states can impose regulations and restrictions as allowed by the Constitution); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 461–62 (1986) (confirming states have an ability to impose some abortion regulations that further their own interests); Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (analyzing when a "[s]tate's profound interest in potential life" can overcome the constitutional right to abortion); Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (addressing a "[s]tate's interest in regulating abortion previability"); Gonzales v. Carhart, 550 U.S. 124, 146–67 (2007) (analyzing a state's ability to prohibit or restrict a certain type of abortion procedure); Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 607–24 (2016) (examining a state's ability to regulate abortion providers as a way to restrict access to abortion).

family privacy to prevent harm to a child.[306] However, like peepholes on the front doors of houses, the viewer can functionally only see what is in the direct line of sight. Therefore, a state could not see or control much in the private sphere beyond pregnancies that had *viable* potential life.

By finding that states can assert an interest in protecting any fetal life, *Dobbs* granted states permission to convert the peephole into a window. Unlike a peephole that gives focused sight into a space, a window enables someone on the outside to see what is directly behind the window. Plus, by repositioning the line of sight, it also lets them see things in the peripheral. Although *Dobbs* only explicitly allowed states to create a window to monitor and control pregnancies, the window is large enough for states to see things to the side of fetal life during a pregnancy.[307] Thus, the window lets states glance to the side of pregnancy to see *potential life* outside of a human body; shifting the viewpoint slightly allows the state to monitor contraception, and looking to the other side, gives a line of sight to parental rights in medical decisions for their minor child, such as abortion care and gender-affirming health care.[308] Even though these areas are beyond fetal life, the state draws a connection between them because of their relationship to protecting the life of a child or potential child.

When *Dobbs* was first decided, states were granted the right to view any part of pregnancy the state classified as potential life. States with fetal personhood laws easily justified a window that framed the entire duration of a pregnancy.[309] However, this large window allowed states to look to the side and see the process of conception outside of the human body (i.e., conception through ARTs).[310] Despite IVF creating an embryo, the destruction of an embryo that was created for IVF—one that has never been inside of a human body—is necessarily different from the common understanding of an abortion. However, fetal personhood laws allowed states to justify expanding the window once again to peer into the act of conception and not just pregnancy. As a result, states have justified restricting the destruction of embryos created outside of the body.[311] With this larger window, states can

306. *See* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 544–48 (2000) (discussing the limitations in the fundamental right to family privacy and the right parents have to raise their children how they choose).

307. *See* sources cited *supra* notes 3–4, 6–7; LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

308. *See, e.g.*, L.W. v. Skrmetti, 83 F.4th 460, 475–78 (6th Cir. 2023) (using *Dobbs* to argue for limiting parental rights to access gender-affirming care for their children).

309. *See* GUTTMACHER, *supra* note 3.

310. *See Bendix*, *supra* note 6.

311. *See LePage*, 408 So. 3d at 683–88 (applying wrongful death of a minor statute to frozen embryos created in vitro); LA. STAT. ANN. §§ 121–133 (2025) (designating an embryo as a legal person and preventing destruction of any embryo).

look to the side of IVF to start scrutinizing other forms of ART such as egg and sperm donation, intracytoplasmic sperm injection, and preimplantation genetic testing. Once in clear sight, the state can easily regulate and control it.

Currently, the bundle of reproductive and family rights function as one big wall of protection that shields reproductive and family decisions from the government's view. By reframing how we see the rights—as individual walls at different angles and depths, rather than one big wall—we can create a set of walls that limit the government's view from the *Dobbs* window. For example, if the right to procreate stands perpendicular to abortion rights, then we can prevent the government from looking to the side to then intervene in ART. Similarly, we could position the wall of procreative rights parallel and behind the wall of abortion rights, creating a second room with privacy for IVF and other aspects of reproduction that occur before an embryo or reproductive material is inside a person.

2. Tipping the Tower of Reproductive and Family Privacy

The second justification for disregarding reproductive and family rights envisions the set of rights like a tower of Jenga blocks that has become unstable after pulling out a piece. In the tower, each block represents a different right within the broad realm of family and privacy rights. When the Court first recognized these rights, the block representing each right sat next to one another as their own distinct rights. However, once the Court started to use the existing rights to find related protections, the blocks began to stack. Over the next half decade or so, a tower of rights came together to represent the cumulation of family and privacy rights. Some of the blocks were pushed slightly out of the tower by subsequent cases on the topic,[312] but later court decisions generally added more blocks or helped to close any gaps in the tower.[313] That was, until *Dobbs*.

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312. *See* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (setting the grounds for states to constitutionally restrict the abortion rights of minors); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (creating the undue burden standard to balance a state's interest in restricting abortion); Gonzales v. Carhart, 550 U.S. 124, 150–67 (2007) (upholding a ban on a specific abortion procedure).

313. *Loving v. Virginia* first strengthened marriage rights by ruling racial-based marriage requirements unconstitutional. 388 U.S. 1, 12 (1967). Then *Obergefell v. Hodges* strengthened marriage rights again by ruling sex-based marriage requirements unconstitutional. 576 U.S. 644, 671–72 (2015). Similarly, *Griswold v. Connecticut* established the right to contraception for married individuals, but *Eisenstadt v. Baird* extended the right to contraception to unmarried individuals. 381 U.S. 479, 506–07 (1965); 405 U.S. 438, 453 (1974).

When *Dobbs* was decided, the Court pulled the block representing abortion rights out of the tower;[314] a block established by *Roe* in 1973.[315] As *Roe* set the abortion rights block early in the process of building the tower of family and privacy rights, removing the block that represented abortion rights caused instability throughout the tower by unsettling a foundational piece. Moreover, some of the blocks in the tower were built to strengthen and expand abortion rights—such as finding the right to abortion applied to incarcerated people and to minors in immigration custody.[316] Since the cases that built these blocks often supported other rights in reproductive and family rights, many have shifted so that the block is half in and half out of the tower, with the *good* law in the tower and the *bad* law hanging off the side. Although parts of the cases are still supporting the tower, the parts hanging off furthered the instability by throwing off the balance and creating holes in the structure.

Issues arise when something needs support from the tower of rights. Previously, when a case dealing with a reproductive or family right found its way into litigation, the right in question could be placed on the top of the tower and was supported by the blocks of privacy and autonomy beneath it. Now, even a *lightweight* case placed on top of the tower could cause it to come crashing down. Some of the blocks representing the rights would likely be fine—for example, the right to procreate would likely be protected because it came into existence relatively independently of other family and privacy rights. After the tower falls, we must rely on the individual blocks to build our arguments rather than the previous structure.

Other rights are more uncertain. Some rights have already been identified as vulnerable—like the right to same-sex marriage or contraception.[317] If the wrong question is placed on the tower by the Court, these blocks may fall, breaking on the way down to prevent their independent use, and even risk taking out other presumably more secure blocks as they fall.[318] By refraining from leaning on the tower, there is a hope that some of

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314. Prior to the Court releasing its official ruling and pulling the abortion rights block out of the tower, the leaked *Dobbs* opinion was like a minor earthquake. Shaking the tower just enough to show it was unstable, but not enough to knock it over yet.

315. Roe v. Wade, 410 U.S. 113, 154 (1973).

316. Monmouth Cnt'y Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341–43 (3d. Cir. 1987) (finding a prison could not restrict access to abortion only based on medical necessity); Garza v. Hargan, 874 F.3d 735, 736 (D.C. Cir. 2017) (finding that immigration custody officials could not physically prevent a minor from leaving the facility to access an abortion).

317. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

318. For example, in defending the right to access IVF or other ARTs, there is a risk that if the bundle or tower of family and privacy rights is relied on, the court will identify a *weak* right that relied on abortion rights or similar logic. After identifying the weak right, other pieces will start to fall, eliminating rights not even directly in question. As a more extreme potential, the Court may also disrupt rights that

these rights can be pushed back into the tower once a more favorable Court revisits them. Importantly, it prevents additional and unnecessary harm that could result from relying on the falling tower.

Therefore, when states attempt to restrict reproductive or family rights, the former tower of rights is not there to support the claim. Additionally, taking blocks for a corresponding right out of the tower is risky because it is unclear whether a pulled block depends on a right found in another block. When IVF is challenged or fetal personhood laws are extended, we can try to pull the blocks for procreation and privacy out of the tower to defend the rights. However, we cannot have much certainty on how the right would be applied or whether the right would even stand on its own anymore.

3. Developing an Independent Right to Procreate

The two approaches above demonstrate that the right to procreate itself does not make reproductive rights vulnerable to attack. Rather, they show that our understanding and use of the right is not productive as a shield in its current form. Separating the right to procreate from the bundles of other family and reproductive rights can help alleviate the issues raised by both approaches. Notably, separating the right to procreate does not mean it cannot be used in conjunction with, or as support for, other reproductive and family rights. It means that we can use it without the risk of other rights weakening it.

So how would separating the right benefit both approaches addressed above? First, pulling the right to procreate out of the Jenga tower is helpful because we know that the right was developed independent of other reproductive rights.[319] This allows us to use the right without fear that its existence is dependent on a series of shaky cases and rights. The downside of this is that the right to procreate has seen very little development in case law.[320] However, analyzing the right to procreate in prisons shows us that this right can be used productively on its own. Unlike in non-carceral settings, most of the bundle of reproductive and family rights are restricted or prohibited in prisons.[321] Of those that do exist, they are often greatly

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were determined completely separate from abortion rights, using the argument in *Dobbs* that courts in the past functionally made up fundamental rights without proper support.

319. The Court in *Skinner* did mention marriage in the decision in explaining why it found the right to procreate, despite illegitimacy and fornication laws to the contrary. *Skinner* did not classify the right to procreate as a right marital couples have. Rather, marriage was used to explain the significance procreation has in U.S. history. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

320. *See supra* Part I.

321. *See Goodwin v. Turner*, 702 F. Supp. 1452, 1454–55 (W.D. Mo. 1988) (explaining how the rights to marriage, procreation, and privacy are abridged while incarcerated).

curtailed.[322] As such, the right to procreate is not based off sexual rights, marital privacy rights, or parental rights. Instead, our understanding of the right to procreate in prisons—even if the ultimate argument on the definition and bounds of the right to procreate were to be constructed differently—is based almost exclusively off the independent right from the limited case law that has developed it.

Second, distinguishing the right to procreate as its own right can help rebuild the privacy and autonomy rights around it. Even if we think of procreation as part of the house of reproductive and family rights, the rights do not have to build just the exterior walls of the house. Instead, individual rights can also form interior walls that can block sight into the home. By using the right to procreate to put up a wall between procreative liberties and pregnancy, the state cannot use the abortion window to look in. Instead, protection within the private sphere of family and reproductive rights can be further protected. However, to know where the right to procreate can put up its wall, we need to know more about what it protects. Once again, turning to procreation in prisons can help determine this.

B. The Right to Procreate Including ARTs

Looking at the right to procreate in prisons provides insights into what the right entails. Since constitutional rights in prisons can be restricted with less scrutiny than normal, the rights identified in the prison context are the minimum rights that should apply outside of confinement. The first major thing to note is that the right to procreate protects the freedom of an individual to try to have a child when they want. This is more than the belief that the right simply protects against state intrusion into a person's body to physically take away their right to procreate. We can reach this conclusion by applying *Cleveland Board of Education v. LaFleur*—which suggested that the government violates the right to procreate when it acts in a way that deters an individual from choosing when to exercise this right[323]—to the prison context. In applying *LaFleur*, a court would find that a prison sentence can be used to deny someone their right to procreate—even though it is not the same level of intrusion into the body as sterilization in *Skinner*—because a prison sentence can put up physical barriers that prevent procreation while

322. *See Gerber v. Hickman*, 291 F.3d 617, 621 (2002) ("Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting. Incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy.").

323. 414 U.S. 632, 640 (1974).

incarcerated. Even if a person is released from incarceration, their right to procreate was still restricted by the sentence.[324]

Another important aspect demonstrated by analyzing the right to procreate in the prison setting is that this right also protects access to non-sexual procreation. For settings where sexual procreation can be banned because of countervailing penological interests—interests that could not be argued outside of prison[325]—non-sexual procreation with ARTs can offer a way to preserve an incarcerated person's right to procreate while balancing a prison's penological interests. Even though non-sexual procreation through ARTs is an alternative to sexual procreation in prison, the same right should extend outside of prison settings regardless of whether the freedom to sexually procreate is available.[326] This is especially true when remembering that some people are only able to procreate through ARTs.

In prisons, the government creates an artificial regulation on sexual procreation. While this restriction is typically temporary and does not physically intrude into a person's body to permanently alter it, non-sexual procreation preserves the right from complete interference.[327] Similarly, if the government were to restrict ART access based on an argument that the right to procreate is not affected because sexual procreation was a *possibility* people could pursue, the restriction would effectively block many people from being able to procreate. Moreover, with a baseline understanding that the right to procreate involves access to ARTs and non-sexual methods because these are necessary for some people, we can also conclude that this right to choice in reproductive methods applies to everyone, regardless of the need to use ARTs to procreate.

Fundamental rights do not become new or different rights in the prison context; they are the same rights that apply outside prison. Likewise, the fact that some people need ARTs to procreate should not be treated as creating a special right available only to them. Thus, just as in the prison context, access to ARTs and non-sexual procreation generally should be seen as protected under the fundamental right to procreate.

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324. *See* discussion *supra* Part III.B.

325. For example, limits on procreation as a means to punish, promote security, or to reduce costs are restrictions that may be plausible in a prison context but are essentially unjustified in other settings. *See supra* Part II.A (describing the test for limiting constitutional rights in prisons, which permits rights that otherwise could not be limited to be restricted for reasons such as costs, punishment, or security).

326. If the right is found to be protected within prisons, even if the right to ART access is an "alternative" to the full right to procreate through sexual or non-sexual methods, then the *full right* should be constitutionally protected outside of prison settings. *See generally* Turner v. Safley, 482 U.S. 78 (1987) (analyzing when a constitutional right that otherwise could not be restricted could be limited within prison settings).

327. *See supra* Part III.B.

Lastly, the right to procreate applies to having your own genetic child (i.e., having a biological child through birth). The emergence of the right to procreate originated out of the desire to deter sterilization. Prior to *Skinner*, sterilization was used predominantly against criminals, mentally ill and disabled people, and poor people.[328] The reasons for sterilization included wanting to deter bad genetics from being passed on and a desire to prevent poor people from raising children.[329] This background is helpful as we try to decide how to apply a modern understanding of reproduction to the right that developed before genetic and biological aspects of reproduction were understood. Reading this alongside the historical justifications for sterilization, the right to procreate developed protections for people whose genetics the state did not want passed on and for people the state did not want to raise a child due to their status or circumstances. Today, this can help protect the rights of people to have their own genetic child and to become pregnant with a child from donated genetic material. Procreation in prison shows us that an individual can procreate in many different ways—some of which depend on the use of donor genetic material or the use of a surrogate. Permitting the donation of genetic material and the use of surrogacy helps further the goals of noninterference in procreation and should extend to people inside and outside of prisons.

This analysis shows that the right to procreate, at a minimum, should include protection from wide noninterference with procreation in various sexual and non-sexual methods. A governmental restriction restricting when or how we procreate can violate our rights. The government may have even more of an obligation to advance the right to procreate outside of prison settings as well. However, additional rights or positive obligations are likely to take shape with the independent development of the right to procreate over time. Despite all this, rights can be constitutionally limited, especially if they interfere with another constitutional right.

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328. Alexandra Minna Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, CONVERSATION (Aug. 26, 2020), https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lasted-into-the-21st-century-143144; Nicole Novak & Natalie Lira, *Forced Sterilization Programs in California Once Harmed Thousands—Particularly Latinas*, MICH. SCH. PUB. HEALTH (Apr. 16, 2018), https://sph.umich.edu/pursuit/2018posts/forced-sterilization-programs-in-california.html.

329. *See Buck v. Bell*, 274 U.S. 200, 205–06 (1927) (upholding a statute that permitted sterilization of "defective persons who if now discharged would become a menace but if incapable of procreating" with the justification that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind").

C. Balancing ARTs with Interests in Potential Life

Now that we know the right to procreate can be isolated as its own right and used to support the freedom to choose reproductive methods, the next important step is to determine where the right can be limited. The most glaring area is the tension between the right to procreate using ARTs and asserted state interests that certain ART procedures harm either potential or actual human life. For example, recent attention surrounding IVF has shown how legal frameworks in Alabama[330] and Louisiana[331] classify an embryo as a person, even when the embryo is created outside of a person.

Balancing these rights with state interests yields no single, definitive outcome. However, state interests must still accommodate the constitutional rights of individuals. As such, there may be a situation where it is determined that states can define personhood at the moment of conception and can therefore provide protections for an embryo. However, the protections for potential embryotic life should not be able to ultimately prohibit all IVF. For example, states should not make a moral judgment about IVF and ban it. If the valid state concern is rooted in protecting embryos, then it should only be able to restrict IVF to the extent necessary to prevent unnecessary destruction of embryos outside of the body.[332] While this would limit access, particularly because of costs,[333] it would preserve at least some access.

Further, states should not be able to prohibit its residents from using ART options available in other states. This is a necessary precaution as states are criminalizing abortions within state boarders and attempting to criminalize abortions that their residence had legally performed in other states.[334] Additionally, the right to procreate should be understood to protect the ability to use donor egg, sperm, or both, as well as the ability to use or be a surrogate; This would expand access and protection to these options.[335] Of

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330. LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 682–88 (Ala. 2024).

331. LA. STAT. ANN. §§ 121–133 (2025) (assigning personhood at the moment an egg and sperm combine, then prohibiting destruction of the embryo unless for specific reasons such as creation solely for research purposes or being deemed statutorily nonviable).

332. *See id.* (prohibiting destruction of an embryo created outside of a person).

333. Alexandra Busto et al., *Recent Cases and Legislative Developments Impacting IVF Services*, NIXON PEABODY (June 26, 2024), https://www.nixonpeabody.com/insights/alerts/2024/06/26/recent-cases-and-legislative-developments-impacting-ivf-services ("The increased risk of liability could lead to increased costs and expenses for IVF clinics, resulting in higher costs for patients.").

334. *See* Hannah Rahim, *The Constitutionality of Banning Interstate Travel for Abortion*, PETRIE-FLOM CTR. (Oct. 16, 2023), https://blog.petrieflom.law.harvard.edu/2023/10/16/the-constitutionality-of-banning-interstate-travel-for-abortion/.

335. *See, e.g.*, *Assisted Reproductive Technologies*, 24 GEO. J. GENDER & L. 337, 355 (Leanne Aban et al. eds., 2023) (explaining how some states have permissive surrogacy laws, some will only recognize a surrogacy contract from outside the state or after the child is born, and some states punish or prohibit surrogacy).

course, states can attempt to restrict access to these methods based on arguments such as preventing coercion and maintaining health. However, these restrictions must meet the requirements of strict scrutiny because even a burden on one potential method of procreation is a government restriction on this fundamental right.

CONCLUSION

In a society where prisons exist in their current state, prioritizing basic human rights and dignities is an important step in countering the harms produced by our carceral systems. This not only helps to humanize incarcerated people, but can help with rehabilitation, individual wellness, and prison functions. One aspect of this is protecting the fundamental right to procreate. Beyond the potential governmental and societal benefits that arise from protecting incarcerated people's right to procreate, the government also has a duty to protect this constitutional right for all people.

While the right to procreate has not received much attention from the courts, it may be one of the few resources to rely on in the constitutional battle over reproductive rights. As a fundamental right recognized prior to other privacy and family rights, the right to procreate does not rest on the foundation of *Roe* or other family, reproductive, or privacy rights. This makes the right to procreate in prisons even more important—it stands as one of the few areas where litigation has defined it as an independent right, rather than as part of the bundle of other privacy and family rights. In the aftermath of *Dobbs*, further developing the right to procreate may serve as an important tool for defending reproductive rights—such as access to ARTs and other medical tools—that can preserve and promote the ability to have children.